5018

. ANDERSON, a minor,
by August W. Anderson, his
father and next friend,
Appellee,

vs.

PETER J. KARSTENS,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

304 - 26076

DONALD W. ANDERSON, a minor,
etc.,
Appellant,

vs.

PETER J. KARSTENS,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

These two appeal cases were consolidated by order of this apellate court on May 18, 1921.

The plaintiff, Donald W. Anderson, a young boy, commenced amaction on the case in the Circuit Court of Cook County to recver damages for personal injuries received by him on August 8, 16, as the result of an explosion which occurred in a public aley immediately adjacent to certain premises owned by the defndant, Karstens, while certain other young boys were playing with ghted matches and a can containing an explosive substance. The eclaration charged defendant with having negligently maintained nuisance attractive and enticing to children of tender years. November 23, 1918, the jury returned a verdict finding defendant ilty and assessing plaintiff's damages at the sum of $7500, and efendant immediately made a motion for a new trial and the same as entered of record. On November 27th, on plaintiff's motion, he court entered a rule on defendant that he fil within 5 days is motion for a new trial in writing, specifying the grounds

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22 I.A. 625

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The plaintiff, Donald W. Anderson, a young boy, commenced action on the case in the Circuit Court of Cook County to recover damages for personal injuries received by him on August 4, 1918, as the result of an explosion which occurred in a public alley immediately adjacent to certain premises owned by the defendant, Karstens, while certain other young boys were playing with lighted matches and a can containing an explosive substance. The declaration charged defendant with having negligently maintained nuisance attractive and enticing to children of tender years. November 23, 1918, the jury returned a verdict finding defendant guilty and assessing plaintiff's damages at the sum of $7500, and defendant immediately made a motion for a new trial and the same was entered of record. On November 27th, on plaintiff's motion, the court entered a rule on defendant that he file within 5 days his motion for a new trial in writing, specifying the grounds

relied upon. Defendant complied, and on December 2nd, filed with the clerk such a motion in writing, specifying 10 separate grounds, two of which were that "the verdict is contrary to law" and that "the verdict is against the weight and preponderance of the evidence." On January 18, 1919, the court overruled the motion for a new trial and entered judgment on the verdict against defendant and he appealed to this court. The transcript of the record, in which was incorporated the original bill of exceptions certified by the trial judge on February 24, 1919, was here filed on February 27, 1919, and the case was given the number 25018 and put on the March, 1919, calendar for determination.

While said appeal was pending defendant, on October 6, 1919, made a motion, suggesting a diminution of the record and asking leave to supply the same instanter. The motion was denied. On December 20, 1919, defendant made a motion to continue the hearing of said appeal case No. 25018, until another appeal (taken by plaintiff from an order of the Circuit Court, entered October 3, 1919, amending said bill of exceptions nunc pro tunc as of February 24, 1919) could be heard and decided. This motion was also denied. On March 3, 1920, a transcript of record in said other appeal, (in which transcript is included a copy of a bill of exceptions certified to by the trial judge on October 14, 1919) was filed in this court, and said other appeal case was here given the number 26076, and put on the March, 1920, calendar for determination.

On May 28, 1920, this court, in case No. 25018, reversed the judgment entered by the Circuit Court for $7500 against defendant with the finding of fact: "We find as facts in this case that the appellant, Peter J. Karstens, was not guilty of any negligence proximately causing the injuries for which he was sued by appellee." The opinion of the court, delivered by Mr. Presiding Justice Matchett, is reported in volume 218 of the Appellate Court reports at page 285. A certificate of importance and an appeal

relied upon. Defendant complied, and on December 2nd, filed with the clerk such a motion in writing, specifying 10 separate grounds, two of which were that "the verdict is contrary to law" and that "the verdict is against the weight and preponderance of the evidence." On January 16, 1919, the court overruled the motion for a new trial and entered judgment on the verdict against defendant and he appealed to this court. The transcript of the record, in which was incorporated the original bill of exceptions certified by the trial judge on February 24, 1919, was here filed on February 27, 1919, and the case was given the number 25018 and put on the March, 1919, calendar for determination.

While said appeal was pending defendant, on October 6, 1919, made a motion, suggesting a diminution of the record and asking leave to supply the same instanter. The motion was denied. On December 30, 1919, defendant made a motion to continue the hearing of said appeal case No. 25018, until another appeal (taken by plaintiff from an order of the Circuit Court, entered October 3, 1919, sustaining said bill of exceptions nunc pro tunc as of February 24, 1919) could be heard and decided. This motion was also denied. On March 3, 1920, a transcript of record in said other appeal, (in which transcript is included a copy of a bill of exceptions certified to by the trial judge on October 14, 1919) was filed in this court, and said other appeal case was here given the number 25074, and put on the March, 1920, calendar for determination.

On May 28, 1920, this court, in case No. 25018, reversed the judgment entered by the Circuit Court for $7500 against defendant with the finding of fact: "We find as facts in this case that the appellant, Peter J. Karstens, was not guilty of any negligence proximately causing the injuries for which he was sued by appellee." The opinion of the court, delivered by Mr. Presiding Justice Matchett, is reported in volume 218 of the Appellate Court

to the Supreme Court was granted, and the Supreme Court, on February 18, 1921, reversed the judgment of this court and remanded the cause to this court with directions. (Anderson v. Karstens, 297 Ill. 76.)

The Supreme Court, as appears from the opinion (p.78), held that the finding of facts by this appellate court, on the question whether the defendant was guilty of negligence approximately causing the injuries for which he was sued, was "sufficient ground for reversing the judgment," and that "the law was properly applied to the facts as found and recited in the finding of facts." But the court said that the point is urged, that the question whether the verdict was against the evidence was not preserved in the record so as to authorize the appellate court to make a contrary finding of fact, and that "this is true on the record as returned" to the Supreme Court; that the bill of exceptions recites that there was a motion by the defendant for a new trial and that the trial court, on motion of the plaintiff, on November 27, 1918, ordered the defendant to file within five days his motion for a new trial in writing, specifying the grounds relied upon for the motion, and that the defendant, on December 2, 1918, filed his motion in writing for a new trial, and that upon consideration by the court the motion was denied; but that no written motion is contained in the bill of exceptions. And the court further held that, although the record kept by the clerk contains a motion for a new trial filed December 2, 1918, specifying many grounds, including among the grounds that the verdict was contrary to the law and against the weight and preponderance of the evidence, "none of these things could be considered by the appellate court, because a motion for a new trial, in order to become a part of the record, must be contained in the bill of exceptions"; that "the grounds of a motion for a new trial can be ascertained only from the bill of exceptions, and the

weight of the evidence can be considered on appeal only where the question was presented on a motion for a new trial and ruled on by the trial court"; and that "if a motion for a new trial is made orally and no requirement is made that the grounds shall be specified the party making the motion may avail himself of any cause for a new trial which may appear in the record, but if the grounds are specified in writing only such as are specified can be considered." And the court further said in its opinion (p. 79):

> "Counsel for appellee say that when this question was raised in the appellate court they suggested a diminution of the record and asked leave to supply instanter the motion in writing for a new trial and their motion was denied. If the view of the appellate court was that there was no necessity for supplying the deficiency that view was incorrect, and if the motion had been allowed and the defect supplied the court could consider the assignment of error on which the judgment was reversed. Errors were assigned on the record in the appellate court corresponding exactly with the written motion for a new trial contained in the clerk's record, and the court considered the assignment of error that the verdict was against the weight and preponderance of the evidence as though it had been properly made upon the record, and it appears that the case was tried and argued on its merits. The transcript of the record of the appellate court recites that the court having considered the motion of Karstens suggesting a diminution of the record and asking leave of the court to supply the same instanter, and the court being fully advised in the premises, denied the motion. The transcript of the record filed in this court consists only of the record written by the clerk and does not contain motions or arguments or evidence in support of them, and consequently the record here does not show what the motion was. If the motion was to supply instanter the motion for a new trial by making it a part of the bill of exceptions in accordance with the rules and practice of the courts it should have been allowed. The law and practice allow amendments with liberality for the attainment of justice, and it would be most unjust if a motion was made to supply instanter the defect and the court denied the motion because from a mistaken view of the law it was regarded as unnecessary. On the record as filed in this court the judgment of the appellate court must be reversed, and the cause remanded to that court to permit the defect in the bill of exceptions to be remedied if the motion was for that purpose and properly made."

> "The judgment of the appellate court is reversed and the cause remanded to that court, with directions that if the suggestion of the diminution of the record and motion to supply the same instanter related to the omission from the bill of exceptions of the written motion which was on file and had been copied in the clerk's record, the motion shall be allowed and the cause again considered upon the grounds contained in said motion and assigned for error, otherwise to affirm the judgment."

weight of the evidence can be considered on appeal only where the question was presented on a motion for a new trial and ruled on by the trial court"; and that "if a motion for a new trial is made usually and no requirement is made that the grounds shall be specified the party making the motion may avail himself of any cause for a new trial which may appear in the record, but if the grounds are specified in writing only such as are specified can be considered." And the court further said in its opinion (p. 79):

"Counsel for appellee say that such this question was raised in the appellate court they suggested a diminution of the record and asked leave to supply inadvertent the motion for a new trial and their request was denied. If we understand the opinion of the appellate court was that there was no necessity for supplying the deficiency that was an error. And if the motion had been filed and the errors assigned the court could consider the assignment of error on which the judgment was reversed. Errors were assigned on the record in the appellate court corresponding exactly with the motion for a new trial contained in the clerk's record, and the court considered the assignment of error that the verdict was against the weight and preponderance of the evidence as though it had been properly and upon the record, and it appears that the case was tried and argued on the merits. The transcript of the record of the appellate court recites that the court heard the argument of the appellant and appellee, a discussion of the record and motion for a diminution of the record, and the court then stated, "we can only review errors in matter and substance, and the only error assigned is in the overruling of the motion." The transcript of the record filed in this court contains only a copy of the motion filed in the clerk's office and does not include motions or statements as indicated in brackets, and consequently the record does not show that the motion was. If the motion was in the record filed in the motion for a new trial by making it a part of the bill of exceptions in accordance with the rules of practice of the courts in which it was then pending. The motion was overruled with exceptions and the appellee asked leave to supply the record with transcript of the motion, but it would be not proper of a motion for a diminution of the record in order to supply inadvertent the defect and the court denied the motion, in denying from a consideration of the law it was regarded as unnecessary. The record as filed in this court the judgment of the appellate court must be reversed, and the cause remanded to that court to permit the defect in the bill of exceptions to be remedied if the motion was for that purpose and properly made."

"The judgment of the appellate court is reversed and the cause remanded to that court, with directions that if the suggestion of the diminution of the record and motion to supply the same inadvertent related to the motion for new trial and bill of exceptions of the written motion which was on file and had been copied in the clerk's record, the motion should be stricken and the cause again considered upon the grounds mentioned in said motion and assigned for error, otherwise the motion should be sustained and the motion for a new trial, otherwise

The remanding order of the Supreme Court was filed in this court and the cause No. 25018 was reinstated, and the defendant renewed his motion suggesting a diminution of the record and asking leave to supply the same instanter. The plaintiff filed counter suggestions and on May 18, 1921, the motion was allowed, and the supplemental transcript of record filed, and the court, of its own motion, ordered that said cause be consolidated with the other appeal case, No. 26076. On May 28, 1921, plaintiff presented his written motion that said supplemental record be stricken from the files but the motion was denied.

From said supplemental record it appears that on October 3, 1919, the Circuit Court entered the following order in said cause:

> "On motion of attorneys for defendant, after notice duly given to the plaintiff, and all parties being in court, and after a careful examination of the record in this case by the Honorable Frank Johnston, Jr., Judge thereof, and of papers filed in said case and made a part of the files in said case, and after an examination of said bill of exceptions, heretofore signed and sealed, to wit, on the 24th day of February A. D. 1919, and the court being fully advised in the premises, said judge certifies that the motion for new trial heretofore filed herein by defendant on December 2, 1918, was argued before him on January 18, 1919, and that said motion for new trial is in words and figures as follows:" (Here is set forth in full defendant's motion for a new trial specifying 10 separate grounds, two of which are that the verdict is contrary to law and that the verdict is against the weight and preponderance of the evidence) "And, therefore, upon motion of defendant's counsel it is ordered that said bill of exceptions heretofore filed herein be and the same is hereby amended by inserting in said bill of exceptions in line 22 on page 290 thereof, after the words 'said motion for a new trial,' the following: 'which is in words and figures as follows:'" (Here is again set forth in full defendant's said motion for a new trial) "And that this order be entered of record in said cause, nunc pro tunc as of the 24th day of February A. D. 1919, to the entry of which order, and the action of the court relative thereto, the plaintiff, by his counsel, then and there excepted, and thereupon the plaintiff prayed an appeal," etc.

It thus appears from said supplemental record that "the suggestion of the diminution of the record * * related to the

omission from the bill of exceptions of the written motion which was on file and had been copied in the clerk's record," and that under the mandate of the Supreme Court, it is now the duty of this appellate court to again consider the cause "upon the grounds contained in said motion and assigned for error."

We have again considered the cause, and are of the opinion for the reasons stated in our former opinion (215 Ill. App. 585) that the judgment of the Circuit Court against the defendant for $7500 must be reversed with a finding of fact.

It appears from the recitals of the order of the Circuit Court amending said bill of exceptions, entered on October 3, 1919, nunc pro tunc as of February 24, 1919, that on the hearing of the motion to amend, of which notice was given to plaintiff, both parties were present and the trial judge examined the record of the cause, all papers filed and made a part of the files thereof, and the original bill of exceptions which he had previously certified to on February 24, 1919. It also appears from the bill of exceptions, certified to by the trial judge on October 14, 1919, and contained in the transcript of the record here filed in said appeal case, No. 26076, that on the hearing of said motion to amend said other bill of exceptions, certified to on February 24, 1919, the defendant's attorney stated in substance to the court that said appeal case (No. 25018) was then pending in the appellate court, that after the verdict was rendered in the Circuit Court defendant made a motion for a new trial, that subsequently on November 27, 1918, the court entered a rule on defendant to file his motion for a new trial in writing, specifying the grounds relied upon, that defendant filed such a motion in writing on December 2, 1918, that on January 18, 1919, the court after argument overruled said motion, that defendant's attorney in preparing his bill of exceptions did not include therein, through error, said written motion for a new

trial, although the bill of exceptions disclosed that such a written motion had been filed, and that the purpose of the motion was to have the court amend the bill of exceptions so that it would show in full said written motion for a new trial. Defendant's attorney thereupon introduced in evidence said original bill of exceptions, thereby showing the above mentioned facts. He also introduced in evidence the written motion for a new trial, bearing the file mark of the clerk of the Circuit Court as having been filed in said cause on December 2, 1918. He also offered in evidence all the files of the case for the purpose of showing that no other motion in writing for a new trial was made except the one filed on December 2nd, but this offer was refused upon plaintiff's attorney stipulating that such was the fact. It was stipulated at said hearing that the term of court, at which the judgment appealed from had been entered, had passed and that the original time within which the defendant was allowed to file his original bill of exceptions had expired.

Counsel for plaintiff now contend that the Circuit Court erred in allowing the amendment to said bill of exceptions for the reason that, the term having passed, there was not sufficient memoranda to amend by, and that as a consequence this appellate court should affirm the judgment of the Circuit Court against defendant for $7500. We cannot agree with the contention. We think that the action of the Circuit Court in allowing the amendment was proper. In Heinsen v. Lumb, 117 Ill. 549, 552, it is said:

> "When a bill of exceptions is once signed and sealed by the judge who tried the case, and is properly filed in court, it becomes a part of the record of the case in which it relates, and it stands precisely upon the same footing as any other record. If a bill of exceptions is executed and filed during term time, it may be amended at any time before the term expires, without notice. During the term the presiding judge who signed it may make any changes or alterations in it which he thinks necessary to make it accord with the facts; but after the term expires, he loses all power to alter or change it on his own motion or mere suggestion. In case of amendments of this kind during the

> term, the proper practice is to call attention of counsel to the fact; but where a bill of exceptions, through inadvertance or mistake, has been so made up as to not fairly and truly represent what actually transpired in court it may, upon due notice, be amended, by order of the court, at a subsequent term * * so as to make it conform to the real facts. That a bill of exceptions may be thus amended, has been expressly held by this court. Goodrich v. City of Minonk, 82 Ill. 121, and Newman v. Ravenscroft, 87 id. 496."

In Dreyer v. The People, 188 Ill. 40, 65, it is said: "In cases where a bill of exceptions may be amended after the term at which the judgment was rendered and after the bill has been settled and signed, for the purpose of supplying an omission or correcting a mistake, the amendment must be based upon some official or quasi official note or memorandum or memorial paper remaining in the files of the case or upon the record of the court." In other cases it has been held that the court may refer to the original bill of exceptions, the pleadings and files of the cause, or the record. (Sullivan v. Eddy, 154 Ill. 199; Coughran v. Gutcheus, 18 Ill. 390; Chicago, M. & St. P. Ry. Co. v. Welsh, 150 Ill. 607; Pollard v. Rutter, 35 Ill. App. 370.) Courts have been liberal in allowing such amendments for the attainment of substantial justice, and, while the law prohibits such amendments being made upon the mere recollection of the trial judge or upon ex parte affidavits or testimony, in the present case the amendment was based upon data contained in the bill of exceptions and the files of the cause.

In case No. 26076 the clerk will enter an order affirming the order of the Circuit Court of October 3, 1919, allowing said amendment to the bill of exceptions, and in case No. 25018, the judgment of $7500 against the defendant, Karstens, entered by the Circuit Court on January 18, 1919, will be reversed.

REVERSED.

Barnes and Morrill, JJ., concur.

147 - 25018

FINDING OF FACT.

We find as a fact in this case that the appellant, Peter J. Karstens, was not guilty of any negligence proximately causing the injuries for which he was sued by appellee.

304 - 26076

DONALD W. ANDERSON, a minor, by August W. Anderson, his father and next friend, Appellant, vs. PETER J. KARSTENS, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

For the reasons indicated in the opinion this day filed in case No. 25018, the order of the Circuit Court, entered October 3, 1919, allowing an amendment to the bill of exceptions, is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

282 - 26054

CHARLES S. GRIFFITH,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY, CHICAGO RAILWAYS COMPANY, CALUMET AND SOUTH CHICAGO RAILWAY COMPANY and SOUTHERN STREET RAILWAY COMPANY, under the name and style of CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

221 I.A. 625

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $7000 rendered by the Superior Court of Cook County in favor of the plaintiff, Griffith, in an action for damages for personal injuries sustained by him on the evening of March 4, 1916, as a result of a right angle collision between a westbound automobile driven by plaintiff and a northbound street car of defendants, at the intersection of Diversey and Kedzie avenues in the city of Chicago. A jury found the defendants guilty and assessed the plaintiff's damages at the sum of $7000.

The main point urged by counsel for defendants is that no recovery can be had on account of plaintiff's contributory negligence.

Plaintiff was sitting at the steering wheel on the left side of the front seat of his Dodge, five passenger automobile, and George Karg was sitting on the right side of the rear seat. As a result of the accident both plaintiff and Karg were injured, the former more severely. Karg also brought an action for damages and recovered a judgment against defendants for $1000 which was affirmed by this appellate court (216 Ill. App. 648). After outlining some of the facts as disclosed by the record in that case this appellate

court in its opinion said: "From such a state of facts there can be no question that there was contributory negligence on the part of the driver, who, in his position, was bound to see the approaching car in time to avoid the accident. But of course his negligence cannot, under the general rule, be imputed to the plaintiff, who was merely an invited guest." And this court further said that it found no good reason for holding that the verdict in said Karg case was against the weight of the evidence either on the question of defendant's negligence or the question whether Karg, as such guest, failed to exercise the ordinary care required of him under the circumstances.

From an examination of the abstract of the record in the present case we glean the following: Diversey avenue is an east and west street, and Kedzie avenue is a north and south street. At the time of the accident there were business houses on three of the corners. The southwest corner was vacant. On the southeast corner there was a grocery store, which had large glass show windows on both streets and which had a cut-off corner entrance, thereby increasing the opportunities of vision from points on Diversey avenue east of Kedzie avenue to points on Kedzie south of Diversey. There were two street car tracks on Kedzie avenue. Northbound cars ran on the east track and southbound cars on the west track. Diversey avenue was a paved street but was not a boulevard. Kedzie avenue was not paved outside of the rails of the street car tracks. There was a row of leafless trees on the east side of Kedzie avenue, south of Diversey, in the space between the east sidewalk and the east curbstone. The most northerly tree of the row was 140 feet south of Diversey avenue and, hence, the trees could not in any manner obstruct the view from Diversey avenue of an object substantially in the center of Kedzie avenue, and 140 feet or less south of Diversey avenue.

One of plaintiff's witnesses testified in substance that a person, standing in the middle of Diversey avenue and approximately 10 feet east of the east side of Kedzie avenue, could see Milwaukee avenue which is two blocks south of Diversey avenue. The distance from the northbound track to the east line of Kedzie avenue is 25 feet and the distance from said track to the east curb line of Kedzie avenue is 11 feet and 4 inches. The collision occurred about 10.30 o'clock in the evening. It was a damp and cloudy night but it was not raining. The headlight on the northbound street car was burning and this as well as the inside lights made the moving car a conspicuous object. Furthermore, the street car was making more noise than usual owing to the fact that the rails were comparatively new. No traffic other than the street car and the automobile was anywhere near the intersection at the time. There were curtains on the sides of the automobile which had large windows made of mica or celluloid, which were transparent and which, as plaintiff testified, did not obstruct his vision in any way. Plaintiff further testified that he was familiar with the location; that he had good hearing and good eyesight, aided by glasses which he wore at the time; that he was driving west on Diversey avenue a little north of the center of the street at a rate of about 15 miles an hour; that when about 50 feet from Kedzie avenue he slackened the speed of the automobile to about 10 miles an hour and afterwards first looked to the south and to the north "to see if there was a street car coming on Kedzie;" that when the front end of the automobile was even with the east building line of Kedzie avenue he again looked to the south and to the north and did not see any street car and continued moving west at a speed of about 6 miles per hour; that when he was about midway between the east building line of Kedzie avenue and the east curb line of that street, and then his automobile was moving at a speed of about 6 miles per hour, he looked both to the south

and to the north a third time, but did not see or hear the oncoming northbound car, and "drove from thence right onto the track"; that he "did not know what happened from that time on;" and that his automobile was a fairly quiet running machine, was in first class condition and equipped with a foot brake and an emergency brake. It further appears from the evidence that the northeast portion of the front dashboard of the street car collided with the center of the automobile and that the automobile was pushed or thrown against the east curb of Kedzie avenue, north of Diversey. According to the estimates of various witnesses the street car, before it reached Diversey avenue, was running at a speed from 12 to 25 miles per hour.

From the facts as above outlined we feel compelled to conclude that plaintiff did not look to the south, as he testified he did, when the front end of his automobile was even with the east building line of Kedzie avenue, or when he was about midway between said building line and the east curb line of that street. Had he done so at either time he could not have failed to have seen the oncoming car because there was nothing to obstruct his view of the conspicuous object. In either position he could have stopped his automobile, moving as he testified at the rate of about 6 miles per hour, before reaching the northbound track and thereby avoided the accident. When the front end of his automobile was even with said east building line it was 25 feet away from the northbound track. Assuming that the street car was travelling at the highest rate of speed testified to by any witness, viz., 25 miles per hour, and continued to travel at that rate up to the time of the collision, and assuming that plaintiff's automobile was travelling at the rate of about 6 miles per hour, the street car could not have been over 100 feet away from the point of collision when plaintiff's automobile

was 25 feet east of said northbound track, or over 60 feet away from the point of collision when plaintiff's automobile was about 15 feet east of said track. Plaintiff says that he looked at the times when his automobile was in said positions and did not see the street car. Had he looked, as he says, he must have seen it, and it is evident that he did not look and was therefore guilty of negligence which contributed to his injuries. In Chicago, Peoria & St. Louis Ry. Co. v. DeFreitas, 109 Ill. App. 104, 106, it is said: "If a person looks, he is supposed to look for the purpose of seeing; and if the object is in plain sight and he apparently looks, but does not see it, it is manifest he does not do what he appears to do. The law will not tolerate the absurdity of allowing a person to testify that he looked, but did not see the train, when the view was unobstructed, and where, if he had properly exercised his sight, he must have seen it." (See, also, Chicago & E. I. R. Co. v. Kirby, 86 Ill. App. 57; Chicago, Rock Island & Pacific Ry. Co. v. Jones, 135 Ill. App. 380, 384; Livingston Warehouse & Van Co. v. Aurora, Elgin & Chicago R. Co., 179 Ill. App. 244, 248; Hedmark v. Chicago Railways Co., 192 Ill. App. 584.)

Our conclusion is that plaintiff is not entitled to recover in this case on account of his contributory negligence at and before the time of the accident and that the judgment must be reversed.

REVERSED.

Barnes and Morrill, JJ., concur.

282 - 26054

FINDING OF FACT.

We find as an ultimate fact in this case that the plaintiff, Griffith, at and before the time of the accident in question, was guilty of negligence which contributed to his injuries.

308 - 26080

JULIAN FRANKIEWICZ,
Appellee,

vs.

NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY,
Appellant.

APPEAL FROM COUNTY COURT, COOK COUNTY.

221 I.A. 626

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $749.68 rendered by the County Court of Cook County against the defendant society, after the verdict of a jury, in an action brought by plaintiff as beneficiary named in an insurance certificate issued by said society, June 26, 1917, on the life of Michael Frankiewicz, a brother of plaintiff and who died at the Cook County hospital in Chicago on March 25, 1918 of pulmonary tuberculosis commonly called consumption. The certificate was for the amount of $1000, but it was provided therein that if the insured should die after six months and within twelve months of the delivery of the certificate the society should be liable for only 70 per cent. of said amount. It was further provided in the certificate that

> "This Beneficiary Certificate is issued by said National Council and accepted by the member only upon the following express warranties, conditions and agreements:
>
> 1. That the application for membership in this Order, made by the said member, together with the report of the Medical examiner, * * both of which are made a part hereof, are true in all respects, and each and every part thereof shall be held to be a strict warranty and to form the only basis of the liability of the Order to said member, or said member's beneficiaries, the same as if fully set forth in this Certificate.
>
> 2. That if said application and medical examination shall not be true in each and every part thereof, then this Beneficiary Certificate shall as to said member, or said member's beneficiaries, be absolutely null and void.

3. This Certificate is issued in consideration of the warranties and agreements made by the person named in this Certificate in said member's application to become a member of this Order and in said member's medical examination, * * ."

The written application is dated June 16, 1917, and above the signature are the following words in part:

"I hereby certify that I am * * in sound physical and mental condition, and that I am a fit subject for life insurance. * * And I hereby declare that the foregoing answers and statements are true, full and correct, and I acknowledge and agree that the said answers and statements, with this application, shall form the basis of my agreement with the Order, and constitute a warranty. I hereby make my medical examination a part of this application and agree that this application and medical examination shall be considered a part of my beneficiary certificate and together with the constitution and laws of the Society as now existing or hereafter amended shall constitute my contract with the Society. I further declare and agree that I have verified each of the foregoing answers and statements from 1 to 45 inclusive and that I know and understand the contents hereof and that the answers and statements as written herein are as given by me."

Among the questions and answers are the following:

"8-d. How many brothers dead? (Give No. here)
Ans. 0.
e. How many sisters have you living? (Give No. here.)
Ans. 0.
f. How many sisters dead? (Give No. here)
Ans. 0.
9-a. Have any of your * * brothers or sisters * * been afflicted with Consumption, Scrofula, * * or Heart Disease? Ans. No."

In the By-Laws of the Society it is provided in section 88 thereof as follows:

"Effect of False Statements. In case any person shall make false representations in his application or medical examination for membership, either as to his physical or mental health or condition, age, or family history, or as to any other fact, * * or shall conceal any other fact affecting the risk, neither such person nor his beneficiary or beneficiaries shall be entitled to receive any benefits by reason of a Beneficiary Certificate having been issued to him."

On the trial Dr. Ignatius J. Przeminski, a witness

called by defendant testified on direct examination without objection that he was the medical examiner for one of the local councils of the society; that he personally examined Michael Frankiewicz for membership in the society; that in making the examination he asked all questions contained in the application and received all answers from the applicant in the Polish language; that he personally wrote the answers accurately and correctly in the application as given by the applicant; that he examined the applicant's chest and lungs with a stethescope but made no microscopic examination of his sputum; and that the "0" in the application, after the question "How many sisters dead?", signifies "none." On cross examination the witness testified that the examination of the applicant consumed about 15 or 20 minutes; that all answers written down in the application were read over to the applicant before he signed the application; that the applicant appeared to be in good health; and that he (witness) did not know any of the applicant's family and did not know that the applicant had had a sister who had died. Dr. Thadeus Xelowski, a practising physician since 1903 and a witness called by defendant, testified that on July 6, 1917 (i. e. 14 days after the signing of said application) he first treated Michael Frankiewicz professionally and examined him; that he found "rales all over his lungs," which indicated tuberculosis and that he had had the disease for several months; that Honorata Ferfecki (a married sister of Michael Frankiewicz) died of pulmonary tuberculosis in September 1916; and that he (witness) treated her professionally a day or two before she died and signed the certificate of her death. Said certificate signed by the witness was introduced in evidence, certifying to her death in Chicago on September 6, 1916, and that the cause thereof was "pulmonary tuberculosis, duration 6 months."

It thus appears that the answers given by the deceased, Michael Frankiewicz, in his said application to the questions "How many sisters dead?" and "Have any of your * * brothers or sisters * * been afflicted with consumption * * ?", were untrue. They were material to the risk and, under the express provisions of the beneficiary certificate and Section 88 of the by-laws of the Society, and under the authority of the cases of Enright v. Knights of Security, 253 Ill., 460, 463, and Crosse v. Knights of Honor, 254 Ill., 80, 84, we do not think that the plaintiff is entitled to recover any sum on said certificate. The judgment of the County Court should be reversed, and it is so ordered.

REVERSED.

Barnes and Morrill, JJ., concur.

308 - 26080

FINDING OF FACTS.

We find as ultimate facts in this case that the deceased, Michael Frankiewicz, in his application for membership in the defendant society, made false statements therein and that they were material to the risk.

317 - 26089

C. E. PHILLIPS,
Appellee,

vs.

EDWARD I. BLOOM,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

2221 I.A. 626

MR. PRESIDING JUSTICE SHURLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of the 4th class in tort in the Municipal Court of Chicago against the defendant, Edward I. Bloom, and L. D. Campbell to recover for the loss of certain rugs and for damage to certain other household furniture, all stored with the defendant. On the trial, at the close of plaintiff's case, the suit was dismissed as to Campbell. The jury found the defendant guilty and assessed plaintiff's damages at the sum of $180.05. Judgment for that amount was entered against the defendant and he appealed.

The place where defendant stored the goods for plaintiff was an apartment building known as 1633 East 67th street, Chicago, then in the course of construction by defendant, the owner. On or about September 16, 1916, plaintiff, desiring to rent one of the flats in the building, called at defendant's office in Chicago and there had a conversation with Campbell, an agent of defendant, resulting in plaintiff agreeing to rent the 3rd flat and making a deposit of $5. On being informed by Campbell that the flat would not be ready for occupancy before November 1st, plaintiff stated that she would have to store her rugs and other furniture during the interim, whereupon Campbell said that that would not be necessary, as defendant was storing other furniture in the building for other prospective tenants, and that her furniture would be locked up in one of the finished

flats and would be absolutely safe. Following Campbell's suggestion plaintiff, on September 20th, sent her rugs and furniture to the building by an expressman. Defendant was present when the delivery was made and allowed the expressman to put them in an apartment where were stored other goods belonging to other persons. Subsequently plaintiff again called on Campbell, procured the key to said apartment, found the door to said apartment unlocked but that all of her goods were there and so advised Campbell. On or about November 11th plaintiff went to said apartment, and found that some of her furniture had been scarred, disfigured and damaged and that the rugs were missing; she thereupon went to defendant's office, found both defendant and Campbell there, advised them of the facts, and subsequently a search was made for the rugs but they could not be found. Defendant denied any responsibility for the missing rugs or for the damage to the furniture. Subsequently plaintiff moved away her furniture and received back her deposit of $5, and her agreement to rent said 3rd flat was cancelled by mutual consent, and she instituted the present action.

Counsel for defendant make substantially three points as grounds for a reversal of the judgment. They first contend that plaintiff was guilty of negligence in leaving the property on the premises, and assumed the risk of the loss thereof, under the conditions which then existed, of which she had notice. We do not think there is any merit in the contention. The proposition that she store her furniture in defendant's building pending its complete construction came from defendant's agent, who assured her that the goods would be locked up and would be absolutely safe. After the goods had been delivered by the expressman she took the precaution to visit the room where the goods were

stored, found that the door to the room was unlocked and advised Campbell of that fact and he replied that he would take care of the matter at once. Counsel next contend that Campbell's agreement with plaintiff that she might store the goods in the building was made without defendant's express authority, and that when Campbell made the agreement he was not acting within the scope of his employment, which was merely that of showing prospective tenants about the premises, negotiating leases, receiving deposits, giving receipts, etc. We think a sufficient answer to this contention is that it appears from the evidence that defendant was desirous of renting the flats as soon as the building was completed, that he had allowed other prospective tenants to store household goods in the building pending its full completion and that when plaintiff's goods were delivered by the expressman he allowed them to be stored in the building.

Counsel further contend that defendant, being a gratuitous bailee, cannot be held liable for loss or damage to property left in his premises unless guilty of gross negligence, and the present record does not disclose that he was guilty of gross negligence.

In Gray v. Merriam, 148 Ill., 179, 187, our Supreme Court, referring to Preston v. Prather, 137 U. S. 604, said: "Gross negligence, as applied to gratuitous bailees, is defined in that case to be 'nothing more than a failure to bestow the care which the property in its situation demanded'; and the court further says: 'the omission of the reasonable care required is the negligence which creates the liability, and whether this existed is a question of fact for the jury to determine.' * * The rule, that a gratuitous bailee is responsible only for the want of care which is taken by the most inattentive, cannot

be applied to all cases of bailment without reward." In Funkhouser v. Wagner, 62 Ill., 59, 60, it is said: "The rule laid down by this court in Bennett v. O'Brien, 37 Ill. 250, and Lumins v. Reed, 44 Ill. 416, was that where goods, when placed in the hands of the bailee, are in good condition and they are returned in a damaged state, or not returned at all, in an action by the bailor against the bailee, the law will presume negligence on the part of the latter, and impose upon him the burden of showing that he exercised such care as was required by the bailment."

In the present case we do not think that defendant sustained the burden, which the law cast upon him, of showing that he exercised such care as was required of him under the circumstances. The finding of the jury was proper and the judgment must be affirmed.

AFFIRMED.

Barnes and Merrill, JJ., concur.

326 - 26098

HUBBARD WOODS MOTOR CAR COMPANY, a corporation,
Appellant,

vs.

H. S. COFFIN,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

222 I.A. 626

MR. PRESIDING JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court, entered December 22, 1919, dismissing plaintiff's action for want of jurisdiction after a trial de novo before the court without a jury on an appeal from a judgment rendered in plaintiff's favor before a justice of the peace.

From the justice's transcript it appears that plaintiff on February 23, 1918, filed an affidavit in replevin claiming that it was entitled to the possession of a certain automobile of the value of $300 and that the defendant, Coffin, wrongfully detained the same; that a writ of replevin was issued, which was subsequently returned by the constable with his endorsement thereon that he had taken the automobile under the writ and delivered the same to the plaintiff; that a trial was had on May 8, 1918, at which time both plaintiff and defendant were present and testified; that it appeared that defendant owed plaintiff the sum of $33.75 for parts furnished and repairs made to the automobile; that judgment was entered in the justice court that plaintiff "have and recover from the defendant the possession of said automobile described in the affidavit and damages of $33.75 and $14.95 costs."

From the bill of exceptions, purporting to show the proceedings had on the trial in the Circuit Court, it appears that both parties were present by their respective attorneys;

that at the commencement of the trial plaintiff's attorney stated that since the judgment in the justice court had been rendered the automobile had been returned to the defendant and that the only question then before the Circuit Court was what amount of money, if any, was due from the defendant to the plaintiff; that this statement as to the return of the automobile was not denied by defendant's attorney; that plaintiff's manager, William H. Schneider, was thereupon called as a witness for plaintiff and his testimony, and certain writings admitted in evidence, tended to show that plaintiff was a garage keeper, that during the month of November, 1917, plaintiff at defendant's request made certain repairs on and furnished certain materials for the automobile for which plaintiff made a total charge of $48.75, that on defendant objecting to the amount of the charge plaintiff reduced the same to $33.75, that defendant subsequently mailed plaintiff his check for $30 in full payment of the charges, which check plaintiff refused to accept and returned to defendant and afterwards started suit in the justice court, and that said charges of $32.75 were fair and reasonable. No testimony was offered by defendant, but at the conclusion of plaintiff's testimony the court, on defendant's motion and after argument, dismissed the suit, saying: "It is a strange matter, but I think that the suit should be dismissed for want of jurisdiction, it being commenced as a replevin suit; let the appellate court decide it."

It appears that the theory of plaintiff in the justice court in replevying the automobile was that plaintiff, being a garage keeper, was, under the Garage Keepers' Lien Act, in force July 1, 1917 (Chap. 82, Rev. Stat. Sec. 3, a,b,c,d.) entitled to the possession of the automobile and to have a lien thereon for said unpaid charges of $33.75, even though plaintiff, after doing the work and furnishing the materials and before its charges had

that the commencement of his trial plaintiff's attorney stated that since the judgment in the justice court had been tendered the automobile had been returned to the defendant and that the only question then before the circuit court was what amount of money, if any, was due from the defendant to the plaintiff; that this statement as to the return of the automobile was not denied by defendant's attorney; that plaintiff's witness, William E. Schneider, was thereupon called as a witness for plaintiff and his testimony, and certain rulings objected to relative thereto, are in evidence. Counsel in this that plaintiff was a storage keeper, that being the trade of Schneider, that plaintiff at defendant's request took certain repairs on and furnished certain materials for the automobile for which plaintiff made a total charge of $48.75, that on defendant objecting to the amount of the charge plaintiff reduced the same to $40.75, that defendant wrongfully making plaintiff the check for $30 in full payment of the charges, which check plaintiff refused to accept and returned to defendant and afterwards started suit in the justice court, and that such charges of $40.75 were fair and reasonable. No testimony was offered by defendant, but at the conclusion of plaintiff's testimony the court, on defendant's motion and after argument, dismissed the suit. "It is a strange matter, but I think that the suit should be dismissed for want of jurisdiction, it being commenced as a replevin suit; let the appellate court decide it."

It appears that the issue of ownership in the justice court in replevying the automobile was that plaintiff, being a garage keeper, was, under the Garage Keepers' Lien Act, in force July 1, 1897 (Chap. 69, Ser. Stat. Ann. ¶ 9,4,4,4) entitled to the possession of the automobile and to have a lien thereon for said repair charges of $40.75, even though defendant, after having the work done, discharged the mechanics and taken the charges but

been paid, had surrendered possession of the automobile to defendants. Section 3, a, of said Act reads as follows: "Garage keepers shall have a lien upon any motor vehicle * * kept by them for the proper charges due, for the keeping thereof, the repair thereof, the materials furnished thereto, and the expenses bestowed thereon at the request of the owner, * * ."

We think that plaintiff, having parted with the possession of the automobile before its bill for said repairs, etc. had been paid, waived its lien and was not entitled to replevy the automobile from the defendant, (Morfa v. Rhodes, 213 Ill. App. 354), although it had a claim against him for said repairs, etc. which if proved might be enforced in a justice court, the claim being within that court's jurisdiction. And we also think that the justice court erred in adjudging that plaintiff recover from defendant the possession of the automobile, although that court could properly have entered a judgment for damages and costs against the defendant, even though the suit was begun in replevin, because a suit in a justice court is whatever the proof makes it regardless of the form of action. (Chicago & Rock Island R. Co. v. Reid, 24 Ill. 144; Edgerton v. Chicago R. I. & P. Ry. Co., 240 Ill. 311, 313.)

The defendant perfected an appeal to the Circuit Court where a trial was had de novo. It appears that prior to said trial plaintiff had returned the automobile, which it had replevied, to the defendant, and that the only question presented for decision by the Circuit Court was whether or not any money was due from defendant to plaintiff, and that plaintiff introduced evidence showing that there was due it the sum of $33.75, together with certain costs.

We are of the opinion that the Circuit Court erred in dismissing the action for want of jurisdiction. On a trial

been paid, had surrendered possession of the automobile to attachment. Section 3, a, of said act reads as follows: "Every tenant shall have a lien upon any motor vehicle * * kept by him for the proper charges due, for the keeping thereof, the repair thereof, the materials furnished therein, and the expense between thereon at the request of the owner, * * ."

We hold that plaintiff, having parted with the possession of the automobile before the bill for said repairs, etc. had been paid, waived its lien and was not entitled to replevy the automobile from the defendant. Ziegler v. Miller, 216 Ill. App. 564), although it had a claim against him for said repairs, etc. which if proved might be enforced in a justice court, the claim being within that court's jurisdiction. And we also think that the justice court erred in adjudging that plaintiff recover from defendant the possession of the automobile, although that fact would properly have entered a judgment for damages and costs against the defendant, even though the suit was begun in replevin, because a suit in a justice court in whatever the proof makes it regardless of the form of action. (Williams v Rock Island R. Co. v. Neil, 84 Ill. 144; Sherman v. Coleman R. R. & E. Mg. Co., 240 Ill. 212, 218.)

The defendant preferred an appeal to the Circuit Court where a trial was had de novo. It appears that prior to said trial plaintiff had returned the automobile, which it had replevied, to the defendant, and that the only question presented for decision by the Circuit Court was whether or not any money was due from defendant to plaintiff, and that plaintiff introduced evidence showing that there was due it the sum of $23.75, supplying with certain items.

It was of the opinion that the Circuit Court erred

de novo of a suit appealed from a justice court, the action is whatever the evidence makes it. (F. H. Hill Co. v. Hommer, 55 Ill. App., 345, 346; Allen v. Nichols, 68 Ill., 250, 252.) And on the trial de novo, the plaintiff may abandon his original cause of action and prove any demand which he may have against the defendant. (Dickinson v. Morgenstern, 111 Ill. App., 543, 545.)

Counsel for defendant make the point that the bill of exceptions does not show on its face that it contains all the evidence heard by the Circuit Court. Immediately following the evidence of the plaintiff the bill of exceptions has the words: "Plaintiff rests, and the testimony here closed." Then follows the motion of defendant's attorney and the decision of the court thereon. Counsel's point is not well taken. (Marine Bank v. Rushmore, 28 Ill., 463, 469; Hill v. Chicago City Ry. Co., 126 Ill. App., 152, 156.)

For the reasons indicated the order and judgment of the Circuit Court are reversed. The cause having been tried before the court without a jury, this court is empowered to here enter the judgment, which the trial court should have entered. Accordingly, judgment for $33.75 is entered in favor of plaintiff and against H. S. Coffin, defendant, together with interest thereon, at the rate of 5 per cent per annum, from December 22, 1919, together with costs here and below.

REVERSED AND JUDGMENT HERE.

Barnes and Morrill, JJ., concur.

de novo of a suit appealed from a justice court, the action is whatever the evidence makes it. (K. S. M.I.I Co. v. *Lemmon*, 88 Ill. App., 348, 352; *Allen* v. *Kimble*, 60 Ill. App., 288, 292.) And on the trial *de novo*, the plaintiff may abandon his original cause of action and prove any demand which he may have against the defendant. (*Illinois* v. *Hitchcock*, 88 Ill. App., 147, 149.)

Counsel for defendant make the point that the bill of exceptions does not show on its face that it contains all the evidence heard by the circuit court. Immediately following the evidence of the plaintiff the bill of exceptions has the words: "TRANSCRIPT CONTD, and the testimony here closed." Then follows the motion of defendant's attorney and the decision of the court thereon. Nowhere else in the bill of exceptions. (*Chicago Cable Railway* v. *Hedges*, 80 Ill. App., 473; *Illinois Life Ins. Co.* v. *Hoffman*, 146 Ill. App., 286, 288.)

For the reasons indicated the order and judgment of the Twelfth Court are reversed. The order heretofore entered before the court without a jury, this cause is remanded to have entered the judgment, which the trial court should have entered. Accordingly, judgment for $25.75 is entered in favor of plaintiff and against C. S. Infirk, defendant, together with interest thereon, at the rate of 5 per cent per annum, from February 21, 1918, together with costs and suit.

REVERSED AND JUDGMENT HERE.

Scott and Jarvis, JJ., concur.

335 - 26107

CLARA NATERS,
Appellee,

vs.

ELIZA J. JENKINSON,
Appellant.

222 I.A. 626

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained a judgment for $400 in the County Court of Cook County in an action of trover and defendant appealed.

The action was commenced on December 3, 1917. Plaintiff averred in her declaration that on to-wit: August 1, 1917, she was the owner and entitled to the possession of certain enumerated furniture, household effects and personal wearing apparel of the total value of $752.75, and that on said date defendant came into possession of the goods and wrongfully converted them to her own use. The defendant filed a plea of the general issue. There was a somewhat protracted trial before a jury.

It appears from the evidence in substance that on November 23, 1917, plaintiff made a written demand on defendant for the return of the goods; that in 1916 plaintiff and her husband, Ralph Naters, were living at No. 1619 Jackson Boulevard, Chicago; that early in October 1916, plaintiff, being ill, was taken to St. Luke's hospital, and it was arranged that the Naters' should break up housekeeping, that plaintiff's furniture, effects and wearing apparel should be packed and stored in the basement of defendant's house and that, pending plaintiff's return from the hospital, her husband would occupy a room in defendant's home; that these arrangements were carried out and certain furniture, and household effects and wearing apparel packed in boxes, trunks, etc., were put in said basement; that on February 5, 1917, plaintiff left the hospital and lived with her husband in defendant's

Plaintiff obtained a judgment for $800 in the County Court of Cook County in an action of trover and defendant appealed.

The action was commenced on December 3, 1917. Plaintiff testified in his direct-in that on [illegible] 1, 1917, she was the owner and entitled to the possession of certain enumerated furniture, household effects and personal property of the total value of $[illegible], and that on said date defendant came into possession of the goods and wrongfully converted them to her own use. The defendant filed a plea of the general issue. There was a separate stipulation which before a jury.

It appears from the evidence in substance that on December 22, 1916, plaintiff made a written lease of furnished for the return of the goods; that in 1916 plaintiff and her husband, John Jones, were living at 2[illegible] Indiana Boulevard, Chicago; that early in February, plaintiff, being ill, was taken to St. John's hospital, and it was arranged that the tenants' effects were to be warehoused. That plaintiff's furniture, effects and wearing apparel should be packed and stored in the basement of defendant's house and that, pending plaintiff's return from the hospital, her husband would occupy a room in defendant's house; that their belongings were packed and stored in the basement, and personal effects and wearing apparel stored upstairs in back, [illegible] etc., were put in said basement; that on February 5, 1917, plaintiff left the hospital and [illegible] with her husband in defendant's

home until March 13, 1917, when defendant moved to another location, on Kenwood avenue; that at this time the furniture, boxes, trunks, etc. were moved to the basement of the new residence, and there stored, and plaintiff and her husband continued to live with defendant until July 19, 1917, when plaintiff and her husband left defendant's house, moved into an apartment on the west side of Chicago, and caused to be taken away from defendant's residence the said furniture, boxes and trunks, or at least a large portion thereof; and that thereafter, as plaintiff testified, she found that the goods in question were missing.

The evidence was very conflicting on the question whether defendant had at any time wrongfully retained possession of any of the enumerated goods and converted them to her own use. It was therefore important that the jury should be correctly and accurately instructed. At plaintiff's request the court gave the following instructions, among others, to the giving of which defendant excepted:

> "1. The jurors are instructed, as a matter of law, that if they shall find from the evidence and under the instructions of the court that the plaintiff was the owner of the property involved in this suit, as shown by the evidence, and was entitled to the possession of the same at the time demand was made upon the defendant herein for the return of such property - if they shall find from the evidence and under the instructions of the court that such was the fact - and at the time that this suit was commenced, and that such property has not been returned by the defendant to the plaintiff, then and in such case the plaintiff is entitled to recover and the verdict must be for the plaintiff.
>
> "2. The jurors are instructed, as a matter of law, that if they shall find from the evidence and under the instructions of the court, the plaintiff was the owner of the property involved in this suit, as shown by the evidence, and entitled to the possession thereof, and that before the commencement of this suit she made demand upon the defendant herein for the return and delivery to her of said property, and that the said defendant failed or refused to return and deliver the same to her upon such demand, this would be evidence of a conversion of said property by the said defendant and would entitle the plaintiff to a verdict in her favor."

home until March 11, 1917, when defendant moved to another location, on Ashland avenue; that at this time the furniture, boxes, trunks, etc. were moved to the basement of the new residence, and there stored, and plaintiff and her husband continued to live with defendant until July 19, 1917, when plaintiff and her husband left defendant's house, went into an apartment on the west side of Chicago, and caused to be taken away from defendant's residence the said furniture, boxes and trunks, or at least a large portion thereof; and that thereafter, as plaintiff testified, she found that the goods in question were missing.

The evidence was very conflicting on the question whether defendant had at any time unlawfully obtained possession of any of the enumerated goods and converted them to her own use. It was therefore important that the jury should be correctly and accurately instructed. At plaintiff's request the court gave the following instructions, among others, to the giving of which defendant excepted:

> "1. The jurors are instructed, as a matter of law, that if they shall find from the evidence and under the instructions of the court that the plaintiff was the owner of the property involved in this suit, as shown by the evidence, and was entitled to the possession of the same at the time demand was made upon the defendant herein for the return of such property - if they shall find from the evidence and under the instructions of the court that such was the fact - and at the time that this suit was commenced, and that such property has not been returned by the defendant to the plaintiff, then and in such case the plaintiff is entitled to recover and the verdict must be for the plaintiff.
>
> "2. The jurors are instructed, as a matter of law, that if they shall find from the evidence and under the instructions of the court, the plaintiff was the owner of the property involved in this suit, as shown by the evidence, and entitled to the possession thereof, and that before the commencement of this suit she made demand upon the defendant herein for the return and delivery to her of said property, and that the said defendant failed or refused to return and deliver the same to her upon such demand, this would be evidence of a conversion of said property by the said defendant and would entitle

We think that both instructions were so misleading and erroneous as to require a reversal of the judgment. Both directed a verdict. The jury could very well have believed that they should find for the plaintiff even though they believed that there was not sufficient evidence to show that defendant had possession of the goods in question when plaintiff's demand was made, or had possession after July 19, 1917, or had at any time converted them to her own use.

The judgment of the County Court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Barnes and Morrill, JJ., concur.

354 - 26133

MABLE HARRISON,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY
et al., doing business
under the name and style
of CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

222 I.A. 626

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek to reverse a judgment for $2,500 rendered in favor of the plaintiff by the Circuit Court of Cook County in an action for damages for personal injuries caused by her being struck by a southeast-bound street car of the defendants while she was in the act of crossing Milwaukee avenue at or near Oakley avenue, in the City of Chicago.

Counsel for defendants urge three points as grounds for a reversal, viz: (1) that plaintiff was not in the exercise of due care for her own safety at and before the time of the accident, (2) that the defendants were not guilty of the negligence charged, and (3) that the court erred in giving certain instructions offered by the plaintiff.

Milwaukee avenue is a street running northwesterly and southeasterly, and defendants operated a double track street railway thereon. Cars moving in a northwesterly direction ran on the east or north track and those moving in a southeasterly direction ran on the west or south track. Oakley avenue is a street running due north and south; it comes into Milwaukee avenue from the north but does not extend south of Milwaukee avenue. Approximately opposite Oakley avenue is Upton avenue, which comes into Milwaukee avenue at right angles from the southwest. The distance between

the east or north curb of Milwaukee avenue and the east or north rail of the northwest-bound track was 10 feet, 10 inches; the gauge of said track was 4 feet, 8½ inches; the distance between the two tracks was 5 feet; hence, the distance from said curb to the east or north rail of the southeast-bound track was approximately 20½ feet. The accident happened on March 13, 1917, about six o'clock in the evening, just before sunset. While it was raining at the time, plaintiff testified that she was not carrying an umbrella and that she could easily see a distance of 60 feet or more. She was 29 years of age and her hearing and eyesight were good. She had been working as a seamstress in a shop at the southeast corner of Milwaukee and Oakley avenues and was familiar with the surroundings. Shortly prior to the accident she left her home on Wilmot avenue at the corner of Oakley avenue, one block north of Milwaukee avenue, and walked south on the east side of Oakley avenue, intending to go to a grocery store on the west or south side of Milwaukee avenue and northwest of Upton avenue. She further testified in substance that when she reached the east or north curb of Milwaukee avenue she looked both north and south, that to the south she saw a number of northbound cars lined up, but to the north she could see nothing moving south; that at the time there was a car passing right in front of her, moving north; that when that car had passed the crosswalk the moterman of another car approaching from the south, having brought his car to a stop, made a motion with his head or hand "toward the direction I was going in, the direction I was facing;" that she then crossed the first track behind the moving northbound car, looked to the north, saw nothing coming, did not stop, started across the second track, took a few steps, heard the sound of a gong, saw a "dark object," and then a southbound car hit her and "she knew no more until she woke up

in the hospital." There was evidence showing that the southbound car, which struck plaintiff, had its headlight burning at the time, and that it stopped within 15 to 25 feet from the point where it struck plaintiff, and there was evidence tending to show that plaintiff was not on the crosswalk when she was struck. The testimony of the motorman of the southbound car and of two passengers, standing on the front platform thereof, was in substance that plaintiff came from behind the moving northbound car, that she was either running or walking at a rapid gait at the time, and that she attempted to cross the second track when the southbound car was only a few feet away from her.

We are of the opinion that under the facts disclosed and under the law plaintiff is not entitled to recover any damages from the defendants on account of her contributory negligence at and before the time of the accident. She says in substance that after she had crossed the first track behind the moving northbound car, and before reaching the second track, she looked to the north and saw nothing coming from that direction. We think that she did not then look. Had she done so she must have seen the approaching car. (Chicago Peoria & St. Louis Ry. Co. v. DeFreitas, 109 Ill. App. 104, 106.) "This court has frequently held that a person passing behind one car and in front of another at a street crossing owes the duty to look before stepping on a parallel track, and failure to do so is contributory negligence." (Buchman v. Calumet & South Chicago Ry. Co., 214 Ill. App. 435, 437, and cases there cited.) The question whether plaintiff exercised due care for her own safety is to be determined, not by the probabilities when she left the sidewalk, but rather by the situation after she had

crossed the first track behind the moving northbound car and before she reached the second track. (Roberts v. Chicago City Ry. Co., 262 Ill. 228, 231.) She could have stopped and allowed the southbound car to pass. The distance between the two tracks was 5 feet. As said in Wyhre v. Chicago City Ry. Co., 216 Ill. App. 128, 131: "If plaintiff looked only the instent she was struck, she failed to look with the care and caution necessary for her safety, so that she must be considered as having moved towards the track and within the danger zone without looking." And the fact, as she says, that the motorman of the second northbound car (which had come to a stop at the crossing) made a motion with his head or hand in the direction she was then going or facing, does not, we think, relieve her from her subsequent negligence in not looking to the north after she had crossed the first track behind the first northbound car and before she reached the second track. If at the time the motorman made said motion her view to the north was obstructed by the first northbound car, his view to the north was likewise, though probably to a lesser degree, obstructed, and said motorman's motion, if made, must be considered as having been made, and so understood by her, as indicating that it was safe for her to pass in front of his car, and not as indicating that it was safe for her to cross the second track without looking to the north. He had a right to presume that plaintiff, in passing in front of his car and behind the other northbound car, would use ordinary care for her own safety in crossing the second track. (Johnson v. Chicago Rys. Co., 212 Ill. App. 660.)

Holding, as we do, that plaintiff is not entitled to recover from the defendants on account of her contributory negligence, it is unnecessary for us to consider the other points urged by defendants' counsel. The judgment of the Circuit Court should be reversed, and it is so ordered.

REVERSED.

Barnes and Morrill, JJ., concur.

crossed the first track behind the moving westbound car and before she reached the second track. (Dugan v. Chicago City Ry. Co., 242 Ill. 228, 231.) She could have stopped and allowed the eastbound car to pass. The distance between the two tracks was 5 feet. As said in Myers v. Chicago City Ry. Co., 214 Ill. App. 128, 131: "If plaintiff looked only the instant she was struck, she failed to look with the care and caution necessary for her safety, so that she must be considered as having moved towards the track and within the danger zone without looking." And the fact, as she says, that the motorman of the second westbound car (which had come to a stop at the crossing) made a motion with his head or hand in the direction she was then crossing or facing, does not, we think, relieve her from her subsequent negligence in not looking to the north after she had crossed the first track behind the first northbound car and before she reached the second track. If at the time the motorman made said motion her view to the north was obstructed by the first northbound car, his view to the north was likewise, though probably to a lesser degree, obstructed, and said motorman's motion, if made, must be considered as having been made, not as interpreted by her, as indicating that it was safe for her to pass in front of his car, and not as indicating that it was safe for her to cross the second track without looking to the north. He had a right to presume that plaintiff, in passing in front of his car and behind the other northbound car, would use ordinary care for her own safety in crossing the second track. (Johnson v. Chicago Ry. Co., 242 Ill. App. 240.)

Nothing, as we do, that plaintiff is not entitled to recover from the defendants on account of her contributory negligence. It is unnecessary for us to consider the other points urged by defendants' counsel. The judgment of the Circuit Court should be reversed, and it is so ordered.

REVERSED.

354 - 26133

FINDING OF FACT.

We find as an ultimate fact in this case that the plaintiff, Mable Harrison, at and before the time of the accident in question, was guilty of negligence which contributed to the accident and to her injuries.

53 - 26173

CENTURY TRUST AND SAVINGS BANK, a corporation, Appellee, vs. GEORGE C. PETERSON COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I A. 627

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff commenced a first class action in the Municipal Court of Chicago against George C. Peterson and George C. Peterson Co., a corporation, as guarantors of a promissory note for $1000, dated January 7, 1918, payable 90 days after date, made by one James J. Garrow. The guaranty on the back of the note is as follows:

> "For value received, the undersigned hereby guarantees the prompt payment of this note at maturity or at any time thereafter, waiving demand, protest and notice of protest.
>
> Geo. C. Peterson Co.
> G. C. Peterson, Pres."

At the time the note was executed and delivered, George C. Peterson was the president of the Geo. C. Peterson Co., hereinafter referred to as the Peterson Company. Peterson, in his affidavit of merits, alleged that the note did not bear his signature as an individual, that said guaranty was made and accepted by plaintiff as the obligation of the Peterson Company, and that he, in his individual capacity, did not at any time assume any personal liability for the payment of the note. The Peterson Company, in its affidavit of merits, alleged in substance that Peterson, as president of the company, had no authority, either express or implied, to execute for and on behalf of the company the guaranty on the note; that the company

received no benefit or consideration, either directly or indirectly, for the guaranty; and that the execution of the same was ultra vires the corporation. The cause was tried before the court without a jury resulting in the court dismissing the suit as to George C. Peterson, but finding the issues against the Peterson Company, and assessing plaintiff's damages at the sum of $1131.63. Judgment for said sum was entered on the finding against the Peterson Company and it prayed and perfected this appeal.

The material facts, which are undisputed, are in substance as follows: Garrow, the maker of the note was engaged in an automobile accessory business, known as the Kennard Tire Service. He had a partner in the business and he was desirous of purchasing his interest and needed to borrow money for that purpose. Early in October, 1917, he applied to the plaintiff bank for a loan of $1500 and offered George C. Peterson individually as a guarantor on his note. The bank refused to accept Peterson individually as a guarantor but was willing to make the loan if Garrow's note was guaranteed by the Peterson Company. Peterson assumed that, as president of the Peterson Company, he had power and authority to guarantee the note in the name of the Peterson Company, and on or about October 6, 1917, a note for $1500 was executed by Garrow, payable in 90 days to the order of the bank, and on the back thereof Peterson, in the name of the Peterson Company, signed a guaranty and the note was delivered to the bank and Garrow received $1500. When the note matured Garrow paid $500 thereon to the bank and gave a new note for $1000, and Peterson, in the name of the Peterson Company, wrote the guaranty above mentioned on the back of the note, and the same as so guaranteed was delivered to the bank. Neither at the time of the execution of the first note nor of the note sued on, did Peterson, as president,

received no benefit or consideration, either directly or indirectly, for the guaranty; and that the execution of the same was ultra vires the corporation. The cause was tried before the court without a jury resulting in the court dismissing the suit as to George C. Peterson, but finding the issues against the Peterson Company, and assessing plaintiff's damages at the sum of $1153.83. Judgment for said sum was entered on the finding against the Peterson Company and it prayed and perfected this appeal.

The material facts, which are undisputed, are in substance as follows: Darrow, the maker of the note was engaged in an automobile accessory business, known as the Consumer Tire Service. He had a partner in the business and he was desirous of purchasing his interest and needed to borrow money for that purpose. Early in October, 1917, he applied to the plaintiff bank for a loan of $1500 and offered George C. Peterson individually as a guarantor on his note. The bank refused to accept Peterson individually as a guarantor but was willing to make the loan if Darrow's note was guaranteed by the Peterson Company. Peterson assumed that, as president of the Peterson Company, he had power and authority to guarantee the note in the name of the Peterson Company, and on or about October 6, 1917, a note for $1500 was executed by Darrow, payable in 90 days to the order of the bank, and on the back thereof Peterson, in the name of the Peterson Company, signed a guaranty and the note was delivered to the bank and Darrow received $1500. Then the note matured Darrow took $500 thereon to the bank and gave a new note for $1000, and Peterson, in the name of the Peterson Company, wrote the guaranty above mentioned on the back of the note, and the same as so guaranteed was delivered to the bank. Neither at the time of the execution of the first note nor of the note sued on, did Peterson, as president,

have any authority under the by-laws of the company to sign such a guaranty. No such authority appears to have been given him by the directors or the stockholders, and the Company did not receive any consideration, directly or indirectly, for the guaranty. Garrow, at the time of the execution of both notes was indebted to the Peterson Company for certain gasoline purchased. The Peterson Company was organized as a corporation under the laws of the state of Delaware on November 2, 1916. At the time of the execution of the note in question it had an authorized capital stock of $100,000, divided into 2000 shares and had about 50 stockholders. In its Delaware charter it is stated inter alia that "the objects for which the corporation is established are primarily to refine, produce, purchase, transport, store, and sell crude petroleum and its products, and to aid other companies and parties in the production, transportation and storage, manufacture and sale of the same;" and that, as subsidiary to and in connection with the foregoing, "the corporation may * * enter into, make, perform and carry out contracts of every kind and for any lawful purpose with any person, firm, association or corporation." In its certificate of authority to do business in Illinois, issued by the Secretary of State August 15, 1917, it is stated that it is authorized "to buy and sell crude petroleum and its products."

We are of the opinion that, under the facts disclosed, the trial court was mistaken as to the law to be applied to the case and erred in entering the judgment appealed from. We think that the guaranty of the Peterson Company, signed by its president, on the note in question, is ultra vires the company and void. (National Home Building & Loan Association v. Home Savings Bank, 181 Ill. 35; Best Brewing Company v. Klassen, 185 Ill. 37; Wheeler v. Home Savings & State Bank, 188 Ill. 34; Calumet & Chicago Canal & Dock Co. v. Conkling, 273 Ill. 318.) And we think that the facts of

have any authority under the by-laws of the company to sign such a guaranty. No such authority appears to have been given him by the directors or the stockholders, and the company did not receive any consideration, tangible or intangible, for the guaranty. Hence, at the time of the execution of that note was insolvent in the Western Company for matters previously overdue. The Western Company was organized as a corporation under the laws of the state of Delaware on November 7, 1910. At the time of the execution of the note in question it had an authorized capital stock of $100,000, divided into 1000 shares and had about 50 stockholders. In the Delaware charter it is stated inter alia that "the objects for which the corporation is established are primarily to refine, treat, purchase, transport, store, and sell crude petroleum and its products, and to all other companies and persons in the production transportation and storage, manufacture and sale of the same;" and that, as relating to and in connection with the foregoing, "the corporation may ... enter into, make, perform and carry out contracts of every kind and for any lawful purpose with any person, firm, association or corporation." In its certificate of authority to do business in Illinois, issued to the secretary of state August 1, 1911, it is shown that it is authorized "to buy and sell crude petroleum and its products."

In view of the opinion that, under the facts disclosed, the trial court was mistaken as to the law is applied to the case and erred in entering the judgment appealed from. It is the opinion of the majority of the Fourth Division, signed by its president, on the note in question, is ultra vires the company and void. (Illinois Zinc Smelting & Lead Manufacture v. Home Savings Bank, 193 Ill. 89; Zero Brewing Company v. Jackson, 183 Ill. 87; Dewing v. Zero Brewing & Ice Co., 184 Ill. 47; Clinton & Chicago Coal & Coke Co. v. Hopkins, 272 Ill. 18.) And we think that the Court of

the present case are different from the facts disclosed in the cases of Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248; Central Lumber Co. v. Kelter, 201 Ill. 503; and Kraft v. West Side Brewery Co., 219 Ill. 205. In the present case there is no evidence tending to show that the business of the Peterson Company would be benefitted by the execution of the guaranty.

For the reasons indicated the judgment of the Municipal Court is reversed.

REVERSED.

Barnes and Morrill, JJ., concur.

The present case was distinguished from the facts obtained in the cases of *Elevator Supply Co.* v. *Intermountain Utilities Development Co.*, 140 [illegible] (1960); *Central Hudson Co.* v. *Salter*, 101 [illegible] 1955; and *Lynch* v. *Bow Club Investor Co.*, 319 [illegible] 1954. In the present case there is no evidence tending to show that the [illegible] of the defective [illegible] would be benefitted by the revitalization of the [illegible].

But the Supreme Court [illegible] the judgment of the Municipal Court in [illegible].

Takara and Barrett, JJ., concur.

79 - 26242

W. A. CASE & SON MANUFACTURING COMPANY, a corporation,
Defendant in Error,

vs.

C. ERWIN NORMAN, trading as C. Erwin Norman & Co.,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

222 I.A. 627

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This writ of error is sued out to reverse a judgment for $14,262.81, rendered after verdict against defendant by the Municipal Court of Chicago in an action of the 1st class.

In plaintiff's statement of claim, filed April 22, 1916, it is alleged in substance that its claim is upon defendant's promissory note for $3000, dated April 3, 1914, and upon defendant's other note for $6500, dated December 7, 1914, payable to plaintiff's order and due 90 days after date, and for interest on said notes at the rate of 6 per cent per annum; and also upon an open account for $6,545.98 for merchandise sold and delivered. Copies of the notes and the account were attached to the statement of claim. Defendant, in his affidavit of merits filed May 1, 1916, alleged in substance that the $3000 note had been paid; denied that he was liable on the open account; alleged that the notes were given plaintiff for certain boilers, radiators, etc. purchased of it; and further alleged that, because said boilers and radiators were defective, defendant had lost sums of money largely in excess of plaintiff's claim and had been damaged in the total sum of $40,000, as more particularly set forth in his claim of set-off filed herewith.

In his affidavit of claim of set-off defendant alleged, in substance, that he had been in the business of selling boilers,

7. A. Lee v. STG WAREHOUSING
CORPORATION, a corporation,
Defendant in error.

Error to
Municipal Court
of Chicago.

Mr. Justice Cohn delivered the opinion of the court.

This writ of error is used out to review a judgment for $24,000.00, rendered after trial against defendant by the Municipal Court of Chicago in an action of the 1st class.

On plaintiff's statement of claim, filed June 26, 1956, it is alleged in substance that the claim is upon defendant's promissory note for $2000, dated April 1, 1956, and upon defendant's other note for $2000, dated November 7, 1954, payable to plaintiff's order and due 90 days after date, and for interest on said notes at the rate of 5 per cent per annum; and also upon an open account for $4,848.00 for merchandise sold and delivered. Copies of the notes and the account were filed to the statement of claim. Defendant, in the affidavit of merits filed May 1, 1956, alleged in substance that the $2000 note had been paid; denied that he was liable on the open account; alleged that the notes were given plaintiff for certain batteries, radiators, etc. purchased of it; and further alleged that, between said batteries and radiators were defective, considerable had been made of money largely in excess of plaintiff's claim and had been damaged in the total sum of $40,000, as more particularly set forth in his claim of set-off filed herewith.

In his affidavit of claim of set-off defendant alleged, in substance, that he had been in the business of selling batteries,

radiators and heating specialties in Chicago for many years, and was favorably known in that business; that the plaintiff induced him to handle the boilers, radiators and accessories manufactured by it, and as a result he relinquished all lines in which he was then engaged, put all his time and energy in the sale of said merchandise, employed extra salesmen and expended large sums of money; that he sold a large number of boilers manufactured by plaintiff known as Series A and Series B, on which his name had been placed by arrangement with plaintiff; that many of these boilers, by reason of defective material and workmanship, cracked, broke or leaked in various parts thereof, and defendant was compelled to spend much time and money replacing said boilers or parts; that there was a warranty as to the quality and fitness of the boilers for the purpose for which they were intended and a breach thereof; that certain radiation did not measure up to the specifications as to the heating surface; that as a result of the cracking and leaking of the boilers, and said shortage in radiation, he lost the good will of many heating contractors and steamfitters, who were organized in the City of Chicago and who had been his customers for many years, and they refused to buy further goods from him, and he was compelled to give up his boiler business entirely and take up an entirely new line of business; and that as a direct result of said breach of warranty, he suffered large losses in profits, and was damaged altogether in the sum of $40,000.

The trial was a protracted one, lasting 11 days. The jury returned a verdict finding the issues against the defendant and assessing plaintiff's damages at the sum of $14,362.81, which is the aggregate sum of the $6500 note and accrued interest, amounting in all to $7,716.83, and the amount of plaintiff's open

radiators and heating specialties in Chicago for many years, and was fortunately known in that business; that the plaintiff induced him to handle the boilers, radiators and accessories manufactured by it, and as a result he relinquished all items in which he was then engaged, put all his time and energy in the sale of said merchandise, employed extra salesmen and expended large sums of money; that he had a fair number of boilers manufactured by plaintiff known as Series A and Series B, on which his name had been placed by arrangement with plaintiff; that many of these boilers, by reason of defective material and workmanship, proved all true or leaked in various parts thereof, and defendant was compelled to spend much time and money replacing such boilers or parts; that there was a material and by the utility and fitness of the boilers for the purpose for which they were intended; that a breach of warranty; that plaintiff did not live up to the specifications as to the heating surfaces; that as a result of the cracking and leaking of the boilers, and their shortage in radiation, he lost the good will of many heating contractors and absentitiers, who had approached in the city of Chicago and who had been his customers for many years, and they refused to buy further goods from him, and he was compelled to give up his boiler business entirely and take up an entirely new line of business; and that is a direct result of said breach of warranty, he suffered large losses in profits, and was damaged altogether in the sum of $40,000.

The total was a protracted one, lasting 11 days. The jury returned a verdict finding for the defendant, and assessing plaintiff's damages at the sum of $14,000.00, which is the aggregate sum of the $6000 note and accrued interest, amounting in all to $7,717.00, for the benefit of plaintiff. Upon

account as stated in its statement of claim, viz., $6545.98.

At the commencement of the trial plaintiff's attorney stated that the $3000 note mentioned in the statement of claim had been paid; that he would introduce the $6500 note, but would not take the time then to figure the interest due; and that "it is understood there is no dispute on the open account." Plaintiff thereupon introduced said note in evidence before the jury and rested his case. The attorney for defendant, who was present, did not make any objection to the statement that there was no dispute as to plaintiff's open account, but, after plaintiff had rested, proceeded at once to introduce evidence in defendant's behalf. If defendant had any objections to the amount of plaintiff's open account, then was the time to voice them. By the silence of his attorney, we think it should be held that defendant admitted the correctness of the amount of said open account; particularly so, as we fail to find anywhere in this voluminous record any testimony offered by defendant calling in question the correctness thereof, and as we notice in the printed argument of counsel for defendant, here filed, the statement that "plaintiff made out his prima facie case by introducing the $6500 note and stating that there was no dispute on the open account." And we think that under the facts and circumstances the contention of counsel of defendant, as stated in said printed argument, that "the jury could not have found a verdict for plaintiff in excess of $7,716.82, the amount of the note with interest," is without merit.

At the conclusion of all the evidence the court orally instructed the jury. A portion of the court's charge is as follows:

account as stated in his statement of claim, viz., $6648.80.

In the commencement of the trial plaintiff's attorney stated that the $6648 note mentioned in the statement of claim had been paid; that he would introduce the $6648 note, but would not take the time to figure the interest due; and that "it is understood there is no dispute on the open account." Plaintiff thereupon introduced such note in evidence before the jury and rested his case. The attorney for defendant, who was present, did not make any objection to the statement that there was no dispute as to plaintiff's open account, but, after plaintiff had rested, proceeded to move to introduce evidence in defendant's behalf. If defendant had any objection to the amount of plaintiff's open account, then now is the time to raise them. By the silence of his attorney, he stated it should be held that defendant admitted the correctness of the amount of said open account; particularly so, as he fail to find anywhere in this voluminous record any testimony offered by defendant calling in question the correctness thereof, and as he writes in the petition-appeal of original for rehearing, Sec. 2147, he statedy that "plaintiff made out his prima facie case by introducing the $6648 note and stating that there was no dispute on the open account." And we hold that under the Code and circumstances the evidence of amount of defendant, as stated in his prima facie (amount), that "the jury could not have found a verdict for plaintiff in excess of $7,718.81, the amount of the note with interest," is without merit.

In the consideration of all the evidence the court properly instructed the jury. A portion of the court's charge is as follows:

"The Court instructs the jury that the plaintiff's claim herein is based upon a promissory note for $6500 introduced in evidence, which, together with interest up to this date, amounts to $7,716.83. You have that down, have you?

The Jurors: Yes.

The Court: In addition thereto the plaintiff claims an open account of $6,545.98, making a total claim of $14,262.81, which amount the defendant herein admits is correct, subject to the defendant's claim of set-off. And the court instructs the jury that their verdict should be for $14,262.81 in favor of the plaintiff, unless defendant has proven by a preponderance of evidence damages under his claim of set-off. And in determining whether or not defendant has suffered any damage the jury must take into consideration only the evidence which has been introduced herein and the instructions of the court as to the law applicable thereto.

Mr. Lee (attorney for defendant): I simply want to save an exception there because I don't know about that. I have not figured it up. I presume it is all right.

The Court: I thought you agreed to that.

Mr. Lee: I don't know that that is the amount. I have not figured it.

Mr. Irwin (attorney for plaintiff): Of course the jury can figure the interest on the note. It is a calculation.

The Court: There was no exception to that. I asked as to whether you would be sworn or not.

Mr. Lee: I am not contesting it. If he says it is all right I am satisfied it is."

Counsel for defendant here contend that the trial court committed error in that portion of the charge above set forth because there was no testimony introduced proving the amount of plaintiff's open account, and because said portion of the charge was in effect an instruction to find the issues in plaintiff's favor and assess its damages at $14,262.81. We cannot agree to this. Plaintiff was not required to introduce any testimony to prove its open account. The correctness of the amount thereof was admitted by defendant's attorney at the commencement of the trial as above shown, and during the lengthy trial said account or the correctness thereof was not questioned, and the sole issue apparently was what amount of damages, if any, defendant was entitled to, as an off-set to his admitted indebtedness to plaintiff. Furthermore, defendant's attorney did not object at the time to that

"The Court instructs the jury that the plaintiff's claim herein is based upon a promissory note for $[illegible] introduced in evidence, which, together with interest up to this date, amounts to $7,712.82. I'm sure you know, Mr. Lee?

The Lawyer: Yes.

The Court: In addition thereto the plaintiff claims an open account of $[illegible], making a total claim of $14,582.82, which amount the defendant herein admits is correct, subject to the defendant's claim of set-off. And the court instructs the jury that their verdict should be for $14,582.82 in favor of the plaintiff, unless defendant has proven by a preponderance of evidence thereunder under his claim of set-off. And in determining whether or not defendant has sufficiently established the jury must take into consideration only the evidence which has been introduced herein and the instructions of the court as to the law applicable thereto.

Mr. Lee (attorney for defendant): I simply want to note an objection because I don't know what that. I have not figured it up. I presume it is all right.

The Court: I thought you agreed to that.

Mr. Lee: I don't know what that is the amount. I have not figured it.

Mr. Irvin (attorney for plaintiff): Of course the jury can figure the interest on the note. It is a mathematical.

The Court: There was no exception to that. I would ask to whether you would be sworn or not.

Mr. Lee: I am not swearing it. If he says it is all right I am satisfied it is."

Counsel for defendant here contend that the trial court committed error in that portion of the charge above set forth because there was no evidence introduced proving the amount of plaintiff's open account, and because said portion of the charge was in effect an instruction to find the issues in plaintiff's favor and assess its damages at $14,582.82. We cannot agree to this. Plaintiff was not required to introduce any testimony to prove his open account. The correctness of the account was admitted by defendant's attorney at the commencement of the trial as above shown, and during the lengthy trial said account or the correctness thereof was not questioned, and the only issue apparently was what amount of damages, if any, defendant was entitled to, as an off-set to his admitted indebtedness to plaintiff. Further-

portion of the said charge wherein was stated the amount of the note and the amount of the open account; he only objected to the amount of interest due, as computed, on the note, and on the ground that he himself did not know the correct amount, which objection he afterwards withdrew as above shown. And said portion of the charge was not an instruction to assess plaintiff's damages at the sum of $14,962.81. The court stated that plaintiff's claim for the amount was "subject to defendant's claim of set-off," and that the jury should return a verdict for the plaintiff in said amount "unless defendant has proven by a preponderance of evidence damages under his claim of set-off." Furthermore, in other portions of the charge, the court fully and fairly instructed the jury as to the law applicable to such a claim for damages as made by defendant and as developed by the evidence, and as to the measure of defendant's damages, if any.

Counsel for defendant also contend that the court, in the portion of the oral charge wherein the jury were instructed that the defendant was required to prove his claim of set-off by the greater weight or preponderance of the evidence, confused the jury by several times using the word "defendant" in the place of "plaintiff". This was probably owing to the fact that the defendant occupied the position of a plaintiff in prosecuting his claim of set-off. The court's attention was called to the mistake and it was immediately corrected. We think that this portion of the charge, as corrected, stated the law with substantial accuracy and was not so unintelligible to the jury as to warrant a reversal of the judgment, as urged by counsel. Furthermore, it does not appear from the record that defendant's attorney objected, or excepted to this portion of the charge. This is necessary for the preservation of the question for review, even where a general

portion of the said charge wherein was stated the amount of the note and the amount of the open account; he only objected to the amount of interest due, as computed, on the note, and on the ground that it be stated all and then the petition should, from objection as aforesaid allowed as above shown. And said portion of the charge was not in instruction to screen plaintiff's damages at the sum of $14,000.00. The court stated that plaintiff's claim for the amount was "subject to defendant's claim of set-off," and that the jury should return a verdict for the plaintiff in said amount "taken affirmatively as proven by a preponderance of evidence despite under his claim of set-off." Furthermore, in other provisions of the charge, the court fully and fairly instructed the jury as to the law applicable to such a claim for damages as made by defendant and as developed by the evidence, and as to the amount of defendant's damages, if any.

Counsel for defendant also contend that the court, in the portion of the said charge wherein the jury was instructed that the defendant was required to prove his claim of set-off by the greater weight or preponderance of the evidence, confused the jury by several times using the word "defendant" in the place of "plaintiff". This was probably owing to the fact that the defendant assumed the position of a plaintiff in presenting his claim of set-off. The court's instruction was confined to the matters and it was immediately corrected. We think that this portion of the charge, as corrected, stated the law with substantial accuracy and was but an unnecessary to the jury as to warrant a reversal of the judgment, as urged by counsel. Furthermore, it does not appear from the record that defendant's attorney objected, or excepted to this portion of the charge. This is necessary for the preservation of the question for review. See Rule 4 Revised

exception to the entire charge is taken, which in the present case was not done. (Pecararo v. Halberg, 246 Ill. 95, 97.)

Counsel further contend that the court erred in refusing to grant defendant's motion for a new trial because of the following circumstances which were disclosed to the court on the hearing of said motion. The defendant presented his affidavit in which he stated, in substance, that after the rendition of the verdict he personally interviewed each of the jurors "and presented to them for their signatures a statement" addressed to the trial court, and the same was signed by each juror; that he showed each juror a copy of a portion of the court's oral charge which was delivered to the jury on the trial; and that said jurors signed said statement without any coercion or inducement or reward or promise of any reward. To said affidavit was attached a portion of the court's oral charge, relative to the damages, if any, to which the defendant was entitled under his claim of set-off and the measure thereof, and also a statement signed by the twelve jurors. This statement is, in substance, that they desired to inform the court that the verdict rendered by them was the result of a misapprehension as to the law given them by the court; that they all were of the opinion that the defendant was entitled to damages under his set-off, but that they understood that such damages could not be allowed unless they were accurately proven in dollars and cents, and that they did not have the right to determine the amount of the damages, because of the failure of the defendant to reduce his claim to dollars and cents as the plaintiff had done; that they did not have in the jury room the instructions given by the court; and that they were satisfied from an examination of such instructions since the rendition of the verdict that they had a wrong conception of the law. We do not think that any error was committed by the court in refusing to grant a new trial

adapting to the action thereon in toto, which in the present case was not done. (Hagemann v. Hallman, 226 Ill. 58, 67.)

Counsel further assert that the court erred in refusing to grant defendant's motion for a new trial because of the following circumstances which were disclosed to the court on the hearing of said motion. The defendant presented his affidavit in which he stated, in substance, that after the rendition of the verdict he personally interviewed each of the jurors "and presented to them for their signatures a statement" addressed to the trial court, and the same was signed by each juror; that he showed each juror a copy of a portion of the court's oral charge which was delivered to the jury on the trial; and that each juror signed said statement without any coercion or inducement or promise of any reward. To said affidavit was attached a portion of the court's oral charge, relative to the damages, if any, to which the defendant was entitled under his claim of set-off and the measure thereof, and also a statement signed by the twelve jurors. This statement is, in substance, that they desired to inform the court that the verdict rendered by them was the result of a misunderstanding as to the law given them by the court; that they all were of the opinion that the defendant was entitled to damages under his set-off, but that they mistakenly, by mistake, damages could not be allowed unless they were mathematically proven in nature and amount, and that they did not have the right to determine the amount of the damages, because of the failure of the defendant to reduce his claim to dollars and cents as the plaintiff had done; that they did not have in the jury room the instructions given by the court; and that they were satisfied from an examination of such instructions since the rendition of the verdict that they had a wrong conception of the law. We do not think that any

because of the affidavit or the jurors' statement. It is the settled rule in this state that neither the affidavits of jurors nor affidavits of statements made by jurors after verdict will be considered to impeach the verdict. (Heldmaier v. Rehor, 188 Ill. 458, 461; Phillips v. Town of Scales Mound, 195 Ill. 353, 363; City of Chicago v. Saldman, 225 Ill. 625, 629.) The reasons for the rule are fully stated in the Rehor and Saldman cases, supra, and we think they apply with force under the circumstances here shown. The court in the oral charge fully and fairly instructed the jury as to what damages, if any, defendant was entitled to under the law, and we think that in its entirety it was, if anything, more favorable to the defendant than the plaintiff. The portion of the charge, which the defendant says in his affidavit he showed to the jurors after verdict, did not contain the limitations and qualifications thereof contained in other portions of the charge given to the jury, and it is not surprising that the jury, having "presented to them for their signature a statement" and not then remembering or realizing the purport of said limitations or qualifications, signed said statement.

Counsel further contend that the conduct of the trial judge at times during the trial, and certain remarks made by him, were such as warrant a reversal of the judgment. This contention is elaborately argued in counsel's printed brief and we have carefully considered the argument and the facts as disclosed from the record. We do not think, however, that because of such conduct and remarks the defendant's case was so prejudiced in the minds of the jury as to warrant a reversal of the judgment. "The trial court in the matter of the conduct of the trial must necessarily be allowed a wide discretion in admonishing witnesses to answer the questions put to them and in compelling obedience to its rulings made during the course of the trial." (Schaffner v. Massey Co., 270 Ill. 207, 218). Furthermore, at the conclusion of the long

because of the affidavit or the jurors' statement. It is the settled rule in this state that either the affidavits of jurors or affidavits of statements made by jurors after verdict will be considered to impeach the verdict. (Heidemeier v. Yeager, 188 Ill. 494, 495; Pullman v. Hall of Fame Club, 197 Ill. 508, 509; Life of Science v. Jackson, 98 Ill. 456, 457.) The grounds for the rule are fully stated in the Yeager and Jackson cases, supra, and we think they apply with force under the circumstances here shown. The court in the usual charge fully and fairly instructed the jury as to what damages, if any, defendant was entitled to under the law, and we think that in its entirety it was, if anything, more favorable to the defendant than the statute. The portions of the charge, which the defendant says in his affidavit he showed to the jurors after verdict, did not contain the limitations and qualifications thereof contained in other portions of the charge given to the jury, and it is not surprising that the jury, having "presented to them for their signature a statement" and not then remembering or realizing the purport of said limitations or qualifications, signed said statement.

Indeed further evidence that the meaning of the trial judge is lost during the trial, and certain remarks made by him, were such as warrant a reversal of the judgment. This contention is elaborately argued in counsel's printed brief and we have carefully considered the arguments and the facts as disclosed from the record. We do not think, however, that because of such conduct and remarks the defendants were not so prejudiced in the minds of the jury as to warrant a reversal of the judgment. "The trial court in the matter of the conduct of the trial must necessarily be allowed a wide discretion in admonishing witnesses to answer the questions put to them and in compelling obedience to its rulings made during the course of the trial." (Schaffner v. Harvey Co.,

and hotly contested trial, the court, at the request of defendant's attorney, included in the oral charge an instruction to the effect that the jury were the sole judges of the facts and that the court did not intend by anything said or done during the trial to intimate what the facts were or how the jury should find on any question of fact.

Counsel for defendant further contend that the evidence disclosed that the defendant had a meritorious cause of action on his set-off and that the verdict of the jury in not allowing the defendant any damages is manifestly against the weight of the evidence. Counsel for plaintiff on the other hand contend that there was not sufficient evidence in support of defendant's claim of set-off to warrant the assessment of any damages against plaintiff.

Defendant and 37 witnesses testified in defendant's behalf and certain of his books of account and a mass of correspondence which passed between the parties were introduced; and plaintiff called three witnesses and introduced many letters written by defendant to plaintiff. Prior to 1911 defendant had been in the business of selling boilers and heating specialties in Chicago for many years. In 1911, a representative of plaintiff called on him, and as a result defendant agreed to purchase certain boilers, etc., manufactured by plaintiff at Buffalo, N. Y., for resale by defendant in Chicago and vicinity, and at such prices as would afford good profits to defendant. Plaintiff's representative stated the boilers were first class in every particular. During that year and the following two or three years defendant purchased many boilers of plaintiff, many of which were known as Series E., and on which by agreement, defendant's name was cast, but defendant did not obligate himself by contract to take any

and hotly contested trial, the court, at the request of defendant's attorney, included in the oral charge on instruction to the effect that the jury were the sole judges of the facts and that the court did not intend by anything said or done during the trial to indicate that the facts were or how the jury should find on any question of fact.

Counsel for defendant further contend that the evidence disclosed that the defendant had a meritorious cause of action on his set-off and that the verdict of the jury in not allowing the defendant any damages is manifestly against the weight of the evidence. Counsel for plaintiff on the other hand contend that there was not sufficient evidence in support of defendant's claim of set-off to warrant the assessment of any damages against plaintiff.

Defendant was in business individual in plaintiff's behalf and certain of his works of authorship and a case of correspondence which passed between the parties were introduced; and plaintiff called three witnesses and introduced many letters written by defendant to plaintiff. Prior to 1921 defendant had been in the business of selling boilers and building specialties in Chicago for many years. In 1921, a representative of plaintiff called on him, and as a result defendant agreed to purchase certain boilers, etc., manufactured by plaintiff in Buffalo, N. Y., for resale by defendant in Chicago and vicinity, and at such prices as would afford good profits to defendant. Plaintiff's representative stated the boilers were first class in every particular. During that year and the following two or three years defendant purchased many boilers of plaintiff, many of which were known as series 1, and on which by statement, defendant's card was left. But defendant did not obligate himself by contract to take any

specific number of boilers. He got them from time to time as ordered and at his suggestion certain changes were made in certain parts. After a time complaints from defendant's customers came in that some of the parts broke and cracked, rendering it necessary to replace the used boilers with new ones or with new parts. Defendant went to considerable expense in time and money in remedying the defects, replacing parts, etc., and in satisfying his customers. He continued, however, to order more boilers, etc. of plaintiff. In November 1913, plaintiff discovered that some of the breaks and defects in the boilers were caused by certain faults of its own in the manufacture of the boilers and so wrote defendant and offered to reimburse him for all costs and expenses in replacing all defective boilers or all defective parts. And the record shows that plaintiff made good its offer and from time to time thereafter allowed defendant credit on his running account for such costs and expenses, on memoranda forwarded by him. Indeed, counsel for defendant in their printed argument say: "It is true that where a section broke plaintiff allowed Mr. Norman to put in a new section and pay the cartage and the services of the steamfitter and gave him credit for this expense, yet failed and refused to pay the expense of Mr. Norman and his men or to recompense him for the loss of the business in which he had spent the greater part of his life." And the record further shows, we think, that defendant failed to prove with the degree of certainty required the incidental loss to his business, referred to by counsel. For about two years after November, 1913, defendant continued to order other boilers, etc. from plaintiff and during this period defendant wrote plaintiff many letters, which were introduced in evidence, and in not one of these letters does defendant say that he has any claim for damages against plaintiff by reason of any incidental loss to his business occasioned by the defects mentioned. The

record further shows that during the year 1915 his indebtedness to plaintiff keeps increasing and he is constantly urged by plaintiff to make larger payments on his account. In October 1915, plaintiff's credit manager calls on defendant in Chicago for the purpose of ascertaining whether defendant's financial condition warrants the extension of further credit. His request for a detailed statement of defendant's assets and liabilities is refused. Defendant makes a payment of $500 on account, promises further payments shortly, mentions the trouble he has had because of the broken sections, but even then does not claim any damages as an off-set to his large indebtedness to plaintiff. Finally plaintiff refused to extend him further credit and in April 1916, commenced the present action. Under all the facts and circumstances in evidence we do not think that the verdict of the jury in not allowing defendant any damages on his set-off is manifestly against the weight of the evidence, or against the law. Nor do we think that the court erred in refusing to allow in evidence certain calculations or compilations made by defendant's bookkeeper from defendant's books which were in evidence.

For the reasons indicated the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

[illegible] Farlow's above last quote the year 1917 his [illegible] so plaintiff began increasing and he is constantly urged by plaintiff to make larger payments on his account. In October 1918, plaintiff's crash. Larger calls on defendant in Chicago for the purpose of ascertaining another defendant's financial condition motivate the statement of further crash. The request for a detailed statement of defendant's assets and liabilities is refused. Defendant makes a payment of $800 on account, [illegible] further requests. Shortly, [illegible] the vendee in his had because of the broken promises, but even then does not claim any damages on account of-set in his large indebtedness to plaintiff. Finally plaintiff refused to accept the further [illegible] and in April 1919, commenced the present action. Taking all the facts and circumstances in evidence we do not think that the vendee of the jury is not allowing defendant any damages on his set-off in manifestly against the weight of the evidence, or against the law. Nor do we think that the court erred in refusing to allow in evidence certain calculations or computations made by defendant's bookkeeper from defendant's books which were in evidence.

For the reasons [illegible] the judgment of the municipal court is affirmed.

AFFIRMED.

Barrett and Barrett, Jr., attorneys.

117 - 26283

MIDWEST COLLECTION BUREAU,
a corporation,
Appellant,

vs.

OTTO F. BECWAR,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 627

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On February 4, 1920, plaintiff commenced an action of the 4th class in contract in the Municipal Court of Chicago against defendant, based upon a written instrument signed by defendant on November 3, 1914. On a trial before the court without a jury the court found the issues against plaintiff and, on May 24, 1920, entered judgment against it for costs, and this appeal followed.

It appears that in the year 1914 the Page-Davis School, of which Edward T. Page was then the president, conducted a correspondence school in advertising in Chicago. On November 3, 1914, defendant called at the office of the school, met a brother of said Page, who induced him to pay $10 and to sign the instrument in question, telling him that it was an application for enrollment in the school, that the school would send him ten lessons, and that he could determine whether he liked them or not and whether he desired to take the full course. In the body of the instrument, partly printed and partly in writing, are the words:

> "I hereby subscribe for and acknowledge the receipt of a scholarship in the Page-Davis School covering a correspondence course in advertising and I promise to pay to Edward T. Page, or his order, the sum of $110 in the following manner: $10 on the 3rd day of November, 1914, and $10 each month thereafter until the amount of $110 in fully paid. * * It is agreed that the delivery to me of the said Scholarship constitutes the acceptance of this subscription by Edward T. Page * * and that this subscription is not subject to cancellation, and that

> he shall not be required to refund any part of the money paid for said scholarship which entitles me to all the benefits of the school's instruction in Advertising (and correct English if necessary) for five years from date."

In very fine print below there is a clause, among others, as follows:

> "Fifth, if default be made in the payment of any one of the aforesaid installments when the same becomes due then the certain amount remaining unpaid at the time of such default shall become at once due and payable."

Defendant further testified that the school sent him three or four lessons by mail, that he answered one, and that later, becoming dissatisfied with the methods of the school, he saw Edward T. Page and informed him that he had decided not to continue the course. Edward T. Page testified that at that interview he (Page) told defendant that the school never cancelled contracts, and that it was ready, able and willing to deliver to him the lessons in the course mentioned in the contract. Defendant had no further relations with the school and made no further payments. On September 4, 1918, Page for a valuable consideration sold and assigned to plaintiff all of his right, title and interest in and to the money claimed to be due on said written instrument. Plaintiff claimed that there was due on the instrument from defendant the sum of $100 and interest thereon at 5 per cent per annum from January 29, 1915.

Written instruments similar to the one here involved have previously been considered by the appellate court for this district in the cases of Page v. Hooster, 213 Ill. App. 239, Midwest Collection Bureau v. Greenwald, 214 Ill. App. 468, and Midwest Collection Bureau v. Creutz, (not yet reported, opinion filed April 12, 1921, No. 25829) and such instruments were there held not to be promissory notes, were "well calculated to deceive

he shall not be required to refund any part of the money paid for said scholarship which entitles me to all the benefits of the school's instruction in advertising and artwork [illegible] for a period of five years from date."

In very fine print below there is a clause, among others, as follows:

"Pitch, if default be made in the payment of any one of the aforesaid installments when the same becomes due then the entire amount remaining unpaid at the time of such default shall become at once due and payable."

Defendant further testified that the school sent him some or four lessons as well, but he received the, but that later, becoming dissatisfied with the methods of the school, he saw Edward T. Page and informed him that he did not intend to continue the course. Edward T. Page testified that at that interview he (Page) told defendant that the school never cancelled contracts, and that it was ready, able and willing to deliver to him the lessons in the course mentioned in the contract. Defendant had no further relations with the school and made no further payments. In September 9, 1919, Pitz Inc a collection association sold and assigned to plaintiff all of his rights, title and interest in and to the money claimed to be due on said written instrument. Plaintiff claimed that there was due on the instrument from defendant the sum of $147 and interest thereon at 8 per cent per annum from January 1, 1919.

Written instruments similar to the one here involved have previously been considered by the appellate court for this district in the cases of Page v. Bergler, 211 Ill. App. 329, Edward Christian Corporation v. Gerstenberg, 221 Ill. App. 464, and Edward Christian Corporation v. Wrucke, [illegible] per curiam, opinion filed April 22, 1921, No. 26820) and such instruments were there held not to be promissory notes, were "well calculated to deceive

any person who might become a party thereto," (Greenwald case, supra) and were "so lacking in mutuality of obligation that no cause of action could be predicated thereon." (Greutz case, supra.) We have reached the same conclusions in the present case, and further that the trial court was fully justified in making the finding and entering the judgment against plaintiff. The judgment of the Municipal Court is accordingly affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

any person who might intend a guilty [illegible] [illegible] such, [illegible] had seen the lawfulness in morality of criminals did be cause of action would be predicated instead. [illegible] such, [illegible].) We have treated the same emolumentum in the private case, and further that the [illegible] court was fully justified in making the finding [illegible] the judgment against [illegible]. The judgment of the Supreme Court is accordingly affirmed.

affirmed.

Costs [illegible] [illegible], [illegible].

136 - 26303

T. B. WOOD,
Appellant,

vs.

F. JOHNSON and F. JOHNSON & COMPANY, a corporation,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County in favor of the defendants in an action on the case tried before a jury. The abstract of the clerk's record does not disclose what the verdict or judgment were. There appear the words: "34, Judgment of the court" and "35, Verdict of the jury." This insufficiency of the abstract of the record is of itself ground for an affirmance of the judgment. (Riley Printing Co. v. Bissell Laundry, 205 Ill. App. 409; Caruthers v. Macaluso, 209 Ill. App. 542; Manning v. Tobey Furniture Co., 211 Ill. App. 522.)

From the abstract of the record it appears that plaintiff's declaration consisted of two counts. In the first he averred that on April 1, 1917, he was "the owner" of certain premises in Chicago, known as 1927 W. California avenue, which were then occupied by him as his residence and as his office as a practicing physician and surgeon. In the second count he averred that he was "the owner and occupant" of said premises. In both counts he averred in substance that the defendants were in possession of property immediately adjoining his premises and there conducted a cement business, using large quantities of cement in bags and operating machinery and apparatus in the mixing and manufacture of cement products; that they negligently dropped and scattered around large quantities of dust, dirt and

This is an appeal from a judgment of the Circuit Court of Cook County in favor of the defendants in an action on the case tried before a jury. The abstract of the clerk's record does not disclose what the verdict or judgment were. There appears the words: "Ad, judgment of the court" and "Ad, verdict of the jury." This insufficiency of the abstract of the record is of itself ground for an affirmance of the judgment. (Riley Printing Co. v. Mercantile Laundry, 205 Ill. App. 409; Cornsbury v. Lessner, 205 Ill. App. 479; Sandine v. Tower Manufacturing Co., 201 Ill. App. 480.)

From the abstract of the record it appears that plaintiff's declaration consisted of two counts. In the first he averred that on April 1, 1917, he was "the owner" of certain premises in Chicago, known as 1717 S. Michigan avenue, which were then occupied by him as his residence and as his office as a practicing physician and surgeon. In the second count he averred that he was "the owner and occupant" of said premises. In both counts he averred in substance that the defendants were in possession of property immediately adjoining his premises and there conducted a cement business, using large quantities of cement in bags and operating machinery and apparatus in the making and manufacture of cement products; that they negligently dropped and scattered across their premises at dust, dirt and

unhealthy matter and negligently caused the same to be blown to and upon plaintiff's premises, thereby causing said premises to become dirty and unhealthy and injuring plaintiff's health and his business as a practicing physician, to his damage, etc. Each of the defendants filed a plea of the general issue and also a special plea denying that plaintiff was the owner in possession of said premises, 1927 S. California avenue.

On the trial it was stipulated and agreed that the legal title to said premises, stated in the declaration to be owned and occupied by the plaintiff, was, at all times covering the occurrences therein mentioned, of record in Stella Wood, the wife of the plaintiff. Inasmuch as plaintiff had alleged he was the owner in possession of said premises and defendants had specifically denied that allegation, it was incumbent on plaintiff to prove it, and evidence of ownership in his wife was not sufficient, it not appearing that plaintiff had some interest, as lessee, or otherwise, in the land which was affected by the alleged nuisance. (Kavanagh v. Barber, 131 N. Y. 211.) Furthermore, it does not appear from the bill of exceptions that plaintiff introduced any evidence whatever to sustain his allegations as to the existence and effect of the alleged nuisance. The trial court did not err in instructing the jury to find each of the defendants not guilty, or in entering the judgment appealed from. The judgment is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

unlawfully neither and negligently caused the same to be given to and upon plaintiff's premises, thereby causing said premises to become dirty and unsanitary and injuring plaintiff's health and his business as a practicing physician, to his damage, etc. Upon of the defendants filed a plea of the general issue and also a special plea averring that plaintiff was the owner in possession of said premises, 1927 R. California reports.

On the trial it was stipulated and agreed that the legal title to said premises, which is the declaration to be owned and occupied by the plaintiff, was, at all times covering the occurrences therein mentioned, of record in Stella Rood, the wife of the plaintiff. Inasmuch as plaintiff had alleged he was the owner in possession of said premises and defendants had specifically denied that allegation, it was incumbent on plaintiff to prove it, and evidence of ownership in his wife was not sufficient, it not appearing that plaintiff had some interest, as lessee, or otherwise, in the land which was affected by the alleged nuisance. (Levanaugh v. Lester, 121 N. Y. 213.) Furthermore, it does not appear from the bill of exceptions that plaintiff introduced any evidence whatever to support his allegations as to the existence and effect of the alleged nuisance. The trial court did not err in instructing the jury to find each of the defendants not guilty, or in entering the judgment appealed from. The judgment is affirmed.

AFFIRMED.

Preston and Martin, JJ., concur.

160 - 26329

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. James W. McCormick, Samuel M. Evans, William Sullivan and Longimus A. Neis,
Petitioner and Appellee,

vs.

WESTERN COLD STORAGE COMPANY, a corporation; CITY OF CHICAGO, a municipal corporation; CHARLES R. FRANCIS, Commissioner of Public Works of said City of Chicago; and FELIX S. MITCHELL, Superintendent of Streets of said City of Chicago,
Respondents.

WESTERN COLD STORAGE COMPANY, a corporation,
Appellant.

222 I.A. 628

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by one of the respondents, Western Cold Storage Company, a corporation, from an order of the Circuit Court of Cook County, entered March 12, 1930, awarding a writ of mandamus commanding the respondents to forthwith remove or cause to be removed a loading platform or bulkhead maintained by said Western Cold Storage Company upon the public sidewalk space adjoining its building at Nos. 12 to 20 East Austin avenue, being on the north side of said avenue and between North State and Cass streets in the City of Chicago, so as to render said sidewalk in front of said building wholly open and unobstructed, and to restore said sidewalk to its proper level, being the same level thereof which obtained before the construction thereon of said loading platform or bulkhead. To the petition of the People, ex rel., etc., the Western Cold Storage Company, one of the respondents, filed an answer, and the other three respondents filed an amended answer, to which answers demurrers were interposed and sustained, and, respondents electing to stand on said answers,

THE PEOPLE OF THE STATE OF
ILLINOIS, ex rel. James C.
McDonald, Samuel H. Ervin,
William Sullivan and
Benjamin A. Dale,
Petitioners and Appellees,

vs.

WESTERN DATA STORAGE COMPANY,
a corporation; BILL OF CHICAGO, a
municipal corporation; MARILYN
E. PULLIN, Commissioner of Motor
Vehicles of Cook City of Chicago;
and MILES A. MCMURRAY, Superintendent
of Streets of Cook City of Chicago,
Respondents.

WESTERN DATA STORAGE COMPANY,
a corporation,
Appellant.

MR. PRESIDING JUSTICE CHALMERS DELIVERED THE OPINION OF THE COURT:

This is an appeal by one of the respondents, Western Data Storage Company, a corporation, from an order of the Circuit Court of Cook County, entered March 12, 1960, awarding a writ of mandamus commanding the respondents in petitioners' favor, to wit: to determine a limited portion of building permits issued by said Commissioner Pullin, the Motor Vehicle Commissioner, for building at Bee, 22 to 60 Cory Lorain avenue, being on the north side of said avenue and between North State and Dean streets in the City of Chicago, to be to number said stairwells in front of said building exactly even and constructed, and to restore said stairwells to the proper level, being the same level thereof were obtained before the construction thereon of said loading platform or building. In the petition of the People, et al., and, the Western Data Storage Company, one of the respondents, filed an answer, and the other three respondents filed an amended answer, in which answers respondents were interested and respondent, [illegible] to which answers petitioners filed a motion to strike and demurrer, which motions were sustained by the court, and respondents elected to stand on their answers.

the order appealed from followed.

In the petition it is alleged inter alia that each of the relators are residents and citizens of the city of Chicago and of the State of Illinois; that the Western Cold Storage Company occupies and does business in a building upon premises located on the north side of said West Austin avenue, between North State and Cass streets, which avenue is a public street; that the sidewalk space abutting upon said premises, is of the width of 14 feet; that the People of the State of Illinois, including said relators as citizens and pedestrians, are lawfully entitled to the free and unobstructed use of said sidewalk space, subject to lawful temporary uses; that said Western Cold Storage Company has been for about ten years past, and is now, maintaining an elevated loading platform or bulkhead upon said sidewalk space, adjoining its said premises; that said platform, which is of wood, begins at the west line of said premises, extends east upon said sidewalk for about ninety one (91) feet, is approximately thirteen (13) feet wide, and of the height of about one and one-half (1½) feet above the level of the sidewalk; that at the westerly end there is a ramp or incline connecting said platform with the level of said sidewalk, which said ramp is about nine (9) feet long and about thirteen (13) feet wide; that said relators and other citizens and pedestrians, in order to travel on the north side of said avenue between said North State and Cass streets, have to walk up and down said ramp; and that said platform is a permanent and unlawful obstruction and should be removed, etc.

The respondent, Western Cold Storage Company, in its answer admitted many of the material allegations of the petition, but it denied that said platform was a permanent or unlawful obstruction or that it should be removed. Respondent further alleged

the order appealed from followed.

In the petition it is alleged _inter alia_ that each of the relators are residents and citizens of the city of Chicago and of the state of Illinois; that the Western Gold Storage Company occupies and does business in a building upon premises located on the north side of said East Austin avenue, between North State and Dearborn streets, which avenue is a public street; that the sidewalk space abutting upon said premises, is of the width of 14 feet; that the people of the state of Illinois, including said relators as citizens and pedestrians, are lawfully entitled to the free and unobstructed use of said sidewalk space, subject to lawful temporary uses; that said Western Gold Storage Company has been for about ten years past, and is now, maintaining an elevated loading platform or building upon said sidewalk space, adjoining its said premises; that said platform, which is of wood, begins at the east line of said premises, extends east upon said sidewalk for about ninety one (91) feet, is approximately thirteen (13) feet wide, and of the height of about one and one-half (1½) feet above the level of the sidewalk; that at the westerly end there is a ramp or incline connecting said platform with the level of said sidewalk, which said ramp is about nine (9) feet long and about thirteen (13) feet wide; that said relators and other citizens and pedestrians, in order to travel on the north side of said avenue between said North State and Dearborn streets, have to walk up and down said ramp; and that said platform is a permanent and unlawful obstruction and should be removed, etc.

The respondent, Western Gold Storage Company, in its answer admitted many of the material allegations of the petition, but it denied that said platform was a permanent or unlawful obstruction or that it should be removed. Respondent further alleged

in substance that it is conducting a public warehouse and a business which is commonly known as the cold storage business; that said platform was built and has since been maintained with the knowledge and consent of the City of Chicago, under licenses granted by said City; that from time to time as said licenses expired extensions thereof have been granted; that the nature of respondent's business requires the handling of a large tonnage to and from its warehouse and that because many of the packages handled are of great weight it is necessary to resort to mechanical means in handling the same; that the height of respondent's receiving floor is 18 inches above the street level, and by means of said platform goods are loaded onto trucks and wheeled directly from the wagons into or from said warehouse; that there is no practical way by which goods can be received or delivered except over said sidewalk, without the use of which it would be necessary to load and unload goods from wagons by the use of skids, which, if used, would take much longer than the present method, would temporarily necessitate storing said goods on the sidewalk, and would cause more inconveniences to the public passing along said sidewalk than does now the use of said raised sidewalk, upon which no goods are stored or allowed to remain; that two of said relators are employees or officers of the Western News Company, a corporation, and all relators are acting at the request of said company, which is paying all the expenses of this suit; that the place of business of said News Company is on the south side of said East Austin avenue at the corner of Cass street, and respondent has another warehouse on the south side of said avenue and east of said North State street, and for many years has maintained a loading platform in front of said other warehouse; that in February, 1918, said News Company caused a mandamus suit to be brought against this respondent for the removal of said last mentioned loading platform

in understanding that it is conducting a public warehouse and a business which is commonly known as the cold storage business; that said platform was built and has since been maintained with the knowledge and consent of the City of Chicago, under licenses granted by said City; that from time to time as said licenses expired extensions thereof had been granted; that the action of respondent's business requires the handling of a large tonnage to and from its warehouse and that because many of the packages handled are of great weight it is necessary to resort to mechanical means in handling the same; that the height of respondent's receiving floor is 18 inches above the street level, and by means of said platform goods are loaded onto trucks and wheeled directly from the wagons into or from cold storage; that there is no practical way by which goods can be received or delivered except over said platform, regardless the fact that it would be economically is load and unload goods from wagons to the one of which, that, if used, would take much longer than the present method, would necessarily necessitate driving said goods on the sidewalk, and would cause more inconvenience to the public passing along said sidewalk than does now the use of said raised sidewalk, upon which no goods are placed or allowed to remain; that the of said janitors and employees or officers of the Western Beer Company, a corporation and all relators are acting at the request of said company, which is paying all the expenses of this suit; that the place of business of said Iowa Company is on the south side of said West Austin avenue at the corner of Oak street, and respondent has another warehouse on the south side of said avenue and east of said Park State street, and for many years has maintained a loading platform in front of said other warehouse, that to relators, like, said Iowa Company erected a sidewalk not to interfere against this re-

which adjoins the place of business of the News Company; that this respondent contested said mandamus suit, and, while the same was pending, said News Company, "through one of its officers," announces to respondent that, if it further opposed said mandamus suit and said News Company was finally successful therein, said News Company would cause a similar suit to be started to require respondent to remove its loading platform on the north side of said avenue, but that said News Company was not interested in whether said platform on the north side of said avenue was maintained or removed, and if respondent would remove said platform on the south side of said avenue the News Company would not take any steps to require the removal of said platform on the north side of said avenue; that neither said News Company, nor any of its officers, agents or employees, have any occasion to use the north side of said avenue or are in anywise inconvenienced or annoyed by said platform; that "this suit is brought solely as a spite suit" on the part of the News Company and for the purpose of punishing this respondent for opposing said other mandamus suit; that respondent is now and for more than 10 years has been a public service corporation, operating its public business at and upon said premises; and that, by virtue of an act of the legislature in force January 1, 1914, in the absence of specific allegation of injury or damage to said relators, or either of them, or to the public, the State Public Utilities Commission of Illinois has exclusive jurisdiction in the first instance of public service corporations, including respondent, whenever it shall be charged that they or it are doing, or permitting or about to permit to be done, anything contrary to law.

We are of the opinion that the action of the trial court, in sustaining the demurrers of the petitioner to the answers of the respondents and in entering the mandamus order appealed from, was fully warranted under the decision in People ex rel. v. Western Cold Storage Co., 287 Ill. 612. In that case our Supreme Court

which adjoins the plant of business of the Iowa Company; that this respondent constructed said roadbeds well, and, while the same was pending, said Iowa Company, through one of its officers, admitted to respondent that, if it further expended well roadbeds well and well Iowa Company was financially responsible, said Iowa Company would cause a similar suit to be started to require respondent to remove its loading platform on the north side of said avenue, but that said Iowa Company was not interested in whether said platform on the north side of said avenue was maintained or removed, and if respondent would remove said platform on the south side of said avenue the Iowa Company would not take any steps to require the removal of said platform on the north side of said avenue; that neither said Iowa Company, nor any of its officers, agents or employees, have any occasion to use the north side of said avenue or are in anywise inconvenienced or annoyed by said platform; that "this suit is brought solely as a spite suit" on the part of the Iowa Company and for the purpose of punishing this respondent for litigating said right cordially well, that respondent is now and for more than 10 years has been a public service corporation, operating its public business under said franchises; and that, by virtue of an act of the legislature in force January 1, 1911, in the absence of specific allegation of injury or damage to said relators, or either of them, or to the public, the State Public Utilities Commission of Illinois has original jurisdiction in the first instance of public service corporations, including respondent, whenever it shall be charged that they or it are doing, or permitting or about to permit to be done, anything contrary to law.

We are of the opinion that the action of the trial court, in sustaining the demurrers of the petitioner to the answers of the respondents and in entering the mandamus order complained of, was fully warranted under the decisions in People ex rel. v. Chicago

in effect directed the removal of a similar loading platform or bulkhead maintained by said Western Cold Storage Company on the sidewalk in front of its premises on the south side of said East Austin avenue because the rights of the public were being interfered with. It was there decided in substance that a cold storage company could not maintain such a platform which covered the sidewalk and constituted a permanent obstruction of the use of the sidewalk by the public, although the storage company had in the past maintained the platform under a license from the city and although other warehouses in the vicinity had had such platforms on sidewalks for many years. The Court in its decision referred to the case of Chicago Cold Storage Warehouse Co. v. People, ex rel., 234 Ill. 287, where it was decided in substance that a city had no power to authorize the construction of a platform or bulkhead, occupying the sidewalk space in front of a building and elevated about 3 feet above the level of the remainder of the sidewalks, for the purpose of making it more convenient for the occupants of the building to load and unload goods, even though such platform was to be used also by the public as a sidewalk, and that upon awarding a writ of mandamus to compel the removal of such a platform the public was prima facie entitled to have the sidewalk restored to the level it occupied before said platform was built.

Counsel for the Western Cold Storage Company contend that it is the law that a writ of mandamus will not be issued where it appears that the suit in which it is sought is not a bona fide suit brought by the real party in interest to enforce some substantial right but that the ulterior purpose is in fact merely to annoy and harrass the respondent; that it is alleged in its answer, and admitted therefore by the demurrer, that the present suit is solely a spite suit brought by the procurement of the Western News

Company; and that, therefore, the trial court erred in sustaining the demurrer to said answer and in entering the order appealed from. We cannot agree with the conclusion. The real party in interest is the public, complaining through four relators admittedly citizens of Chicago and Illinois. (County Commissioners of Pike County v. People, ex rel., 11 Ill. 202, 208; People, ex rel. v. Harris, 203 Ill. 272, 276.) In the Pike County case, supra, it is said: "Where the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced." Furthermore, the demurrer to the answer of said respondent admits only those facts therein contained which are well placed, and not conclusions. That the Western News Company, "through one of its officers," made the announcement mentioned in said answer to said respondent, or that said News Company or its agents or employees have no occasion to use the sidewalk on the north side of said East Austin avenue and are not inconvenienced or annoyed by said platform, we regard as immaterial and irrelevant allegations. We think that it sufficiently appears that the general public is being inconvenienced and its rights infringed by the maintenance of the platform.

And even if it be conceded that respondent is a public service corporation under the control of the State Public Utilities Commission it does not follow, as contended by counsel, that the license granted to respondent by the City council to maintain the raised platform in said sidewalk space is valid. We are not aware that such corporations have any special rights or privileges to maintain permanent obstructions to the travelling public in its use of the public sidewalks.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

182 - 26353

THOMAS J. McCARTHY,
Appellee,

vs.

S. OPPENHEIMER & COMPANY,
a corporation,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

222 I.A. 628

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $961.54 rendered June 19, 1920, by the County Court of Cook County against the defendant corporation in an action of assumpsit tried before a jury.

Plaintiff's original declaration, filed December 10, 1919, consists of a special count and the common counts. In the special count it is alleged that on January 1, 1919, in consideration of plaintiff rendering certain services to defendant, the latter promised to pay to the former the sum of $4,470 per annum, in installments of $47.50 a week and one installment of $2000 at the end of said year 1919; that plaintiff, relying on defendant's promise, engaged in its service and faithfully performed the work required of him from January 1, 1919, up to and including June 30, 1919, at which time, without fault on his part, his employment was terminated, and thereupon there became and was due him from defendant the sum of $1,000, which sum defendant, although often requested, has refused to pay. On January 24, 1920, in compliance with a rule, plaintiff filed a bill of particulars, in which the statements were substantially the same as in said special count. The paper contained the additional statement that on June 30, 1919, there was owing to him "one-half of the lump sum salary which would be payable to the plaintiff if his services had continued up to December 31, 1919," or the sum of $1,000.

On January 30, 1920, while the demurrer which defendant had interposed to plaintiff's said special count was still pending and undisposed of, plaintiff asked leave to file, and filed on February 2, 1920, an amended special count and an amended bill of particulars, in which latter paper plaintiff stated that about January 1, 1919, he was employed by defendant at a salary of $4,470 a year, or, if the employment was terminated in less than one year, then the salary was to be proportioned to the time employed on the basis of $4,470 per year, "said sum of $4,470 to be divided into weekly installments, to be paid at the end of each and every week, defendant reserving the right to deduct such portion of the weekly installments as might be agreed upon between the parties and retain the same in safe keeping for the plaintiff, all amounts so retained by the defendant to be paid in a lump sum to the plaintiff at the end of the year, or at the termination of the employment if said employment was terminated within the year;" that plaintiff entered upon his said employment on January 1, 1919, and continued to perform the duties required of him up to and including June 30, 1919, when he was dismissed from defendant's service although ready and able to continue therein; that defendant paid him the sum of $47.50 each week from January 1, 1919, to June 30, 1919, "retaining in its custody for safe keeping all sums of money due the plaintiff in excess of $47.50 per week;" that on defendant's termination of plaintiff's employment on June 30, 1919, he demanded of defendant the balance of all moneys due him, amounting to the sum of $1,000, which said sum or any part thereof defendant refused to pay, etc. The allegations contained in plaintiff's amended special count are substantially the same as those in said amended bill of particulars. To said amended special count the defendant filed a plea of the general issue.

On the trial plaintiff was the only witness in his behalf,

on January 30, 1920, while the demurrer which defendants had interposed to plaintiff's said amended count was still pending and undisposed of, plaintiff asked leave to file, and filed on February 2, 1920, an amended second count and an amended bill of particulars, in which latter paper plaintiff stated that about January 1, 1918, he was employed by defendant at a salary of $4,272 a year, or, if the employment was terminated in less than one year, then the salary was to be proportionate in the time employed on the basis of $4,272 per year, "said sum of $4,272 to be divided into weekly installments, to be paid at the end of each and every week, defendant reserving the right to deduct such portions of the weekly installments as might be agreed upon between the parties and retain the same in safe keeping for the plaintiff, all sums so retained by the defendant to be paid in a lump sum to the plaintiff at the end of the year, or at the termination of the employment if said employment was terminated within the year;" that plaintiff entered upon his said employment on January 1, 1918, and continued to perform his duties thereunder up to and including June 30, 1918, when he was discharged from defendant's service although ready and able to continue thereon; that defendant paid him the sum of $47.88 each week from January 1, 1918, to June 30, 1918, "withholding in its custody for safe keeping all sums of money due the plaintiff in excess of $47.88 per week;" that on defendant's termination of plaintiff's employment, on June 30, 1918, by reason of defendant's failure of its duty to supply the [illegible] amounting to the sum of $1,000, which sum or any part thereof defendant refused to pay, etc. The allegations contained in plaintiff's amended special count are substantially the same as those in his amended bill of particulars. In this amended special count the defendant filed a plea of the general issue.

In the bill plaintiff was the only witness in his behalf.

and two officers of the defendant testified for it. At the conclusion of plaintiff's evidence, and again at the close of all the evidence, defendant's attorney moved for a directed verdict in defendant's favor but both motions were denied. The jury returned a verdict finding the issues for the plaintiff and assessing his damages at the sum of $961.54, and the judgment appealed from followed.

Plaintiff testified in substance that he left defendant's employ "under pressure" on June 23, 1919, after having worked for it for many years; that just prior to said date his work was that of supervising the employees of the Chicago factory and other factories of defendant; that after January 1, 1919, and up to the time he left he received from defendant as salary weekly installments of $47.50; that during the calendar year of 1918 he received in weekly installments the total sum of $2385, and also received just prior to Christmas Day the further sum of $2000; that during the calendar years of 1915, 1916, and 1917, he received his salary in weekly installments and about Christmas time in said years additional sums, - in 1915, $1400, in 1916, $1740, and in 1917, $1800; that a Mr. Freund, who died on April 30, 1919, was for many years the president of defendant; that plaintiff talked with said Freund several times during several years with reference to his salary; that he never made any arrangement with Mr. Freund by which defendant was to keep part of plaintiff's weekly salary for him, and never made such an arrangement with anyone else; that he never knew until the end of each year what he would get; that he was not told at the beginning of the year 1919 that he would get a certain sum at the end of the year; that no one promised to give him $1000 at the end of six months; that he never had any conversations with Louis Oppenheimer, vice president and treasurer of defendant, as to salary or compensation for the years 1918, or 1919; that in September, 1918,

and two officers of the defendant testified for it. At the conclusion of plaintiff's evidence, and again at the close of all the evidence, defendant's attorney moved for a directed verdict in defendant's favor but both motions were denied. The jury returned a verdict finding the issues for the plaintiff and assessing his damages at the sum of $3841.64, and the judgment appealed from followed.

Plaintiff testified in substance that he left defendant's employ "under pressure" on June 30, 1919, after having worked for it for many years; that just prior to said date his work was that of supervising the employees of the Chicago Tannery and other factories of defendant; that after January 1, 1918, and up to the time he left he received from defendant as salary weekly installments of $40.00; that during the calendar year of 1918 he received in weekly installments the total sum of $2080, and also received just prior to Christmas that the further sum of $1000; that during the calendar years of 1915, 1916, and 1917, he received his salary in weekly installments and about Christmas time in said years additional sums, in 1915, $1000, in 1916, $1140, and in 1917, $1500; that a Mr. Freund who died on April 24, 1919, was for many years the president of defendant; that plaintiff talked with Mr. Freund several times during several years with reference to his salary; that he never made any arrangement with Mr. Freund by which defendant was to keep part of plaintiff's weekly salary for him, and never made such an arrangement with anyone else; that he never knew until the end of each year what he would get; that he was not told at the beginning of the year 1918 that he would get a certain sum at the end of the year; that he was promised to give him $1000 at the end of six months; that he never had any conversations with Louis Oppenheimer, vice president and treasurer of defendant, as to salary or com-

his salary was raised $2.50 per week, at which time said Oppenheimer gave him an envelope containing said increased sum therein; and that said Oppenheimer handed him money at the end of the year 1918 but made no arrangement with him as to the year 1919. Louis Oppenheimer testified in substance that he had general charge of defendant's Chicago office from October 1916, until after plaintiff left defendant's employ; that during said period up to the time of his death, Freund had practically retired from active business; that when plaintiff left he received the week's salary that was due him, but plaintiff did not make any demand for any further sum, although his attorney subsequently did; that it was defendant's custom to give Christmas presents each year to some of its employees; that he (Oppenheimer) had charge of the distribution of those presents for the years 1918 and 1919; that in making the distributions and determining the amounts he was guided by the prosperity of the defendant and the length of service of the employee; that they were purely gifts; that the amounts were left to his discretion; that he never said anything to plaintiff regarding the amount he should receive around Christmas for the years 1918 or 1919; and that it was his sole action which increased plaintiff's Christmas present in 1918 to $2,000, over the $1,800 present which he received in 1917. Clarence L. Coleman testified that he had been the secretary of defendant for nine years; that he had employed the help for the past four years; that plaintiff's salary in 1919 was $47.50 per week; that he made no demands upon the witness for any additional sum when he left defendant's employ; and that to the witness' knowledge plaintiff was never told that for the years 1918 or 1919 he should receive any fixed sum at the end of the year.

In our opinion plaintiff did not prove the case as stated in his amended special count and in his amended bill of particulars. The object of requiring a plaintiff to file a bill of particulars

is to inform the defendant of the claim he is called upon to defend against, and the effect of a bill of particulars is to limit and restrict the plaintiff on the trial to proof of the particular cause or causes of action therein mentioned. (Waidner v. Fauly, 141 Ill. 442, 445.) A careful examination of the testimony fails to disclose that about January 1, 1919, plaintiff was employed at a salary of $4,470 a year; or that about said date it was agreed between the parties that, if plaintiff's employment be terminated in less than one year, his said salary should be proportioned to the time employed on the basis of $4,470 per year, "said sum of $4,470 to be divided into weekly installments, to be paid at the end of each and every week, defendant reserving the right to deduct such portion of the weekly installments as might be agreed upon between the parties and retain the same in safe keeping for the plaintiff, all amounts so retained by the defendant to be paid in a lump sum to the plaintiff at the end of the year, or at the termination of the employment if said employment was terminated within the year;" or that prior to June 23, 1919, when plaintiff left defendant's employ, defendant had during said portion of the year, 1919, "retained in its custody for safe keeping" for plaintiff any sum or sums of money in excess of $47.50 per week, which last mentioned sum defendant had paid plaintiff each week during said portion of said year. On the contrary we think that the evidence discloses that in September 1918, while plaintiff was working for defendant, his weekly salary of $45 was voluntarily increased by defendant to $47.50; that on June 23, 1919, when plaintiff left defendant's employ, he had been fully paid all salary or sums due him; that the sums which plaintiff as well as other employees received from defendant about Christmas time in the year 1918, and previous years, were mere gratuities; and that at the time of the commencement of the present action defendant was not indebted to plaintiff in any amount.

Accordingly, the judgment of the County Court is reversed.

REVERSED.

Barnes and Morrill, JJ., concur.

182 - 26353

FINDING OF FACTS.

We find as facts in this case that on or about January 1, 1919, the plaintiff, McCarthy, did not make the agreement with the defendant as set forth in plaintiff's amended special count and in his amended bill of particulars; th t prior to October 1, 1918, the plaintiff was employed by the defendant at the weekly salary of $47.50; that the plaintiff continued to work for the defendant until June 23, 1919; that at said date all salary due the plaintiff had been fully paid by the defendant; and that the defendant is not indebted to the plaintiff in any sum or sums.

191 - 26364

JOSEPH SZYMANSKI, a minor, by Alex Szymanski, his father and next friend, Appellee, vs. WESTERN DIE AND STAMPING WORKS, a corporation, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

222 I.A. 628

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $3000 rendered against the defendant on July 8, 1920, by the Superior Court of Cook County, in an action for damages for personal injuries sustained by the plaintiff, a minor, on July 10, 1919, while he was operating a stamping machine or punch press in defendant's factory in Chicago. The index and middle fingers of plaintiff's right hand were cut off at about the second joints, and the third or ring finger was crushed or injured.

On November 11, 1919, a summons was issued, returnable to the January term 1920, and served on defendant on November 18, 1919. Defendant entered its appearance within the required time. Plaintiff filed his declaration, consisting of three counts, on January 19, 1920, which was more than ten days before the commencement of the February, or second, term of said court. No further proceedings were had in the cause until April 30, 1920, when, on plaintiff's motion, the court entered an order defaulting the defendant. The language of the order is such as to suggest that it was entered for want of an appearance rather than for want of a plea. On the same day the court further ordered that a reference be had to a jury to assess the plaintiff's damages. The jury returned a verdict finding defendant guilty and assessing plaintiff's damages at the sum of $3,000, and a judgment for that

This is an appeal from a judgment for $8000 rendered against the defendant on July 6, 1920, by the superior court of Cook County, in an action for damages for personal injuries sustained by the plaintiff, a minor, on July 20, 1917, while he was operating a electric machine at punch press in defendant's factory in Chicago. The index and middle fingers of plaintiff's right hand were cut off at about the second joints, and the third or ring finger was crushed or injured.

On November 11, 1918, a judgment was issued, returnable to the January term 1920, and served on defendant on November 13, 1919. Defendant entered its appearance within the required time, plaintiff filed his declaration, consisting of three counts, on January 12, 1920, which was more than ten days before the commencement of the February, or second, term of said court. No further proceedings were had in the cause until April 7, 1920, when, on plaintiff's motion, the court ordered a order defaulting the defendant. The language of the order is such as to suggest that it was entered for want of an appearance rather than for want of a plea. On the same day the court further ordered that a reference be had to a jury to assess the plaintiff's damages. The jury returned a verdict finding defendant guilty and assessing plain-

amount was entered against defendant.

On June 16, 1920, the defendant filed a verified petition in which it alleged that no notice was given it of plaintiff's motion to enter said default, or of the issuance of a writ of inquiry to assess damages, and that it had no knowledge thereof until June 11, 1920; that when the suit was instituted Rule 20 of the rules of said court was in force, wherein it is provided that "no motion will be heard or order made in any cause without a notice to the opposite party, when the appearance of such party has been entered, except where a party is in default or when a cause is reached on the call of the trial calendar;" that defendant has a meritorious defense, the nature of which is (1) that plaintiff at the time of the alleged injury "was over the age of 16 years," and being over that age "the court did not have jurisdiction by reason of the Workmen's Compensation Act," and (2) that the amount of the damages assessed were excessive; and defendant prayed that said default and judgment be set aside.

Between the date when defendant was required to plead to the declaration and the date of the entry of said default order 85 days intervened, and in the petition no facts were alleged showing lack of negligence in not filing a plea.

Plaintiff, by his father and next friend, filed a verified answer to the petition alleging that at the time of the accident he was about four months over 14 years of age, having been born on March 18, 1905, and that the cause did not come within the purview of said Workmen's Compensation Act.

On June 29, 1920, as appears from the bill of exceptions, a hearing was had on the petition and defendant introduced in evidence the affidavit of a physician to the effect that on July 10, 1919, plaintiff came to his office in Chicago for treatment of the right hand and stated that he was then 17 years of age. Over

amount was ordered against defendant.

On June 16, 1926, the defendant filed a verified petition in which it alleged that no notice was given it of plaintiff's motion to enter said default, or of the issuance of a writ of injury to assess damages, and that it had no knowledge thereof until June 11, 1926; that when the writ was instituted only 20 of the rules of said court was in force, wherein it is provided that "no motion will be heard or order made in any cause without a notice to the opposite party, when the appearance of said party has been entered, except where a party is in default or when a cause is reached on the call of the trial calendar;" that defendant has a meritorious defense, the nature of which is (1) that plaintiff's the time of the alleged injury "was over the age of 18 years," and being over that age "the court did not have jurisdiction by reason of the Workmen's Compensation Act," and (2) that the amount of the damages assessed are excessive, and defendant prays that its petition and judgment be set aside.

Between the date when defendant was required to plead to the declaration and the date of the entry of said default order 20 days intervened, and in the petition no facts were alleged showing lack of negligence in not filing a plea.

Plaintiff, by his father and next friend, filed a verified answer to the petition alleging that at the time of the accident he was about four months over 14 years of age, having been born on March 16, 1909, and that the court did not come within the purview of said Workmen's Compensation Act.

On June 29, 1926, as appears from the bill of exceptions, a hearing was had on the petition and defendant introduced in evidence the affidavit of a physician to the effect that on July 10, 1924, plaintiff came to his office in Chicago for treatment of the

defendant's objection plaintiff introduced the counter-affidavits of Rev. Father Dembinski, Rector of St. Stanislaw Church, and Joseph Szymanski, father of plaintiff, conclusively showing that plaintiff was born on March 18, 1905, and hence, at the time of the accident, was over 14 years of age and under 16 years. The court, at the conclusion of said hearing, denied defendant's motion to vacate said default order, but, with the consent of plaintiff's attorney, entered an order vacating the judgment, and the cause was set for a new hearing on July 8, 1920, before a jury, on the question solely of the assessment of plaintiff's damages. At this hearing both parties and their respective attorneys were present. Plaintiff and four witnesses in his behalf testified and one witness, a physician, testified in defendant's behalf. The jury returned a verdict finding the defendant guilty and assessing plaintiff's damages at $4,250. Plaintiff remitted $1,250, and judgment was entered against defendant for $3,000 and this appeal followed.

Counsel for defendant contend that the trial court erred in refusing to set aside the default order, entered on April 30, 1920, because defendant's appearance was then on file. Although, as above stated, the language of the default order is such as to suggest that defendant was defaulted for want of an appearance, the record discloses that plaintiff was then entitled to a default for failure of defendant to file a plea. Furthermore, defendant, made no showing that it, or its attorney, had not been guilty of negligence in not filing a plea. And, regarding the provision of Rule 26 of the rules of the trial court, that no motion will be heard or order entered in any cause without notice to the opposite party when such party's appearance has been entered, it appears from the rule itself that the provision is not operative "where the party is in default." We do not think that the court committed

any error in refusing to set aside the default order. In the case of Flaff v. Pacific Express Co., 251 Ill., 243, 246, it appears that after the defendant had been served and had entered its appearance in writing, but had failed to plead to the declaration in apt time, the trial court entered a default order in almost the identical language as that in the present case, and the Supreme Court in its opinion said:

> We think it manifest that a judgment by default, after an appearance has been filed, for want of an appearance is irregular, and that the proper order in such a case is judgment nil dicit or for want of a plea. The entering of a default judgment for want of an appearance instead of for want of a plea, after an appearance is on file, is, however, a mere irregularity and should not work a reversal of the judgment. Although a defaulted party has a meritorious defense, a default will not be set aside if he or his attorney has been guilty of negligence." (Citing cases.)

Counsel also contend that the trial court erred in allowing plaintiff, on the hearing of defendant's motion to set aside the default order, to introduce counter affidavits as to the age of plaintiff. It is well settled that on the hearing of such a motion counter affidavits relating to the merits of the cause should not be received. (Mendell v. Kimball, 85 Ill., 582; Gilchrist Transportation Co. v. Northern Grain Co., 204 Ill., 510.) One of the reasons for the rule is that "courts cannot do justice to parties in thus trying the merits upon affidavits, when the affiants are not subject to cross-examination." (Mendell v. Kimball, supra.) But we understand the rule to be that where the controversy arising on such a motion does not involve the merits of the cause, counter affidavits may be filed. (Gilchrist Transportation Co. v. Northern Grain Co., 204 Ill., 510, 513.) In the present case defendant in its petition stated, as one of the grounds for setting aside the default, that plaintiff at the time of the accident was over 16 years of age and that the court did not have jurisdiction to try the case by reason of the Work-

any error in refusing to set aside the default order. In the case of Kiefer v. Travelers Insurance Co., 201 Kan., 240, 246, it appears that after the defendant had been served and had entered its appearance in writing, but had failed to plead to the petition in apt time, the trial court entered a default order in almost the identical language as that in the present case, and the Supreme Court in its opinion said:

> "I think it manifest that a judgment by default, after an appearance in writing, and that the proper order in such a case is judgment nil dicit or for want of a plea. The entering of a default judgment for want of an appearance instead of for want of a plea, after an appearance in writing, is, however, a mere irregularity and should not work a reversal of the judgment. Although a defaulted party has a meritorious defense, a default will not be set aside if he or his attorney has been guilty of negligence." (Citing cases.)

Counsel also contend that the trial court erred in allowing plaintiff, on the hearing of defendant's motion to set aside the default order, to introduce certain affidavits as to the age of plaintiff. It is well settled that on the hearing of such a motion counter affidavits relating to the merits of the cause should not be received. (Maxwell v. Kimball, 85 Ill., 268; Gilchrist Transportation Co. v. Northern Grain Co., 204 Ill., 310.) One of the reasons for the rule is that "courts cannot do justice to parties in thus trying the merits upon affidavits, upon the affidavits are not subject to cross-examination." (Maxwell v. Kimball, supra.) But we understand the rule is to be that where the controversy arising on such a motion does not involve the merits of the cause, counter affidavits may be filed. (Gilchrist Transportation Co. v. Northern Grain Co., 204 Ill., 310, 312.) In the present case defendant in its petition stated, as one of the grounds for setting aside the default, that plaintiff at the time of the accident was over 18 years of age and that the court

men's Compensation Act. In plaintiff's answer to the petition it was stated that at the time of the accident he was under 16 years and over 14 years of age. If this was so the court had jurisdiction to try the case. (Moszek v. Bauerle & Stark Co., 282 Ill., 557.) And on this question of plaintiff's age we think that it was proper for the court to then hear both sides so as to determine the question before proceeding further, and that the court did not err in allowing counter affidavits to be presented.

Other points are urged by counsel for defendant as grounds for a reversal of the judgment. We have considered them and deem them to be without merit. No question is raised as to the sufficiency of the declaration to sustain the judgment.

Accordingly the judgment of the Superior Court is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

215 - 26388

LORENZO HOECKER,
Appellant,

vs.

JOHN MULHERN,
Appellee.

APPEAL FROM
CITY COURT OF
CHICAGO HEIGHTS.

222 I.A. 628

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On February 6, 1918, the plaintiff commenced a tort action in the City Court of Chicago Heights against the defendant to recover damages for personal injuries. At the trial on January 7, 1919, the court instructed the jury to find the defendant not guilty and they returned such a verdict. Plaintiff, by his attorney, George A. Brinkman, entered a motion for a new trial, which motion was overruled on April 7, 1920, and judgment entered against the defendant for costs, and plaintiff prayed an appeal to this appellate court, which was allowed upon his filing an appeal bond to be approved by the clerk of the court within 60 days, and he was given 90 days within which to file a bill of exceptions. This order of judgment and allowing the appeal was signed by the Honorable Charles H. Bowles, Judge of said city court who had presided at the trial of the case. On May 18, 1920, plaintiff filed his appeal bond, approved by said clerk, in the usual form.

On May 19, 1920, the said George A. Brinkman withdrew as attorney for plaintiff and D. K. Lindhout was substituted in his stead. On June 10, 1920, there was filed in the office of the clerk of said court a stipulation, signed by the then attorneys for the respective parties, to the effect that the time for filing the bill of exceptions in the cause be extended to September 7, 1920. No order was entered making such extension. On June 29, 1920, there was filed in said clerk's office a notice signed by

the Honorable George A. Brinkman, then judge of said court, from which it appeared that defendant's attorneys had been previously notified that on said day he (said judge), of his own volition, would "change the venue of the cause and send the same to the Circuit Court of Cook County," because he had acted as attorney for the plaintiff in the trial of the cause and was interested in its outcome, and that on that account it would be illegal for him as judge to enter any orders in the cause except to transfer the same to some court to assume jurisdiction thereof. On the same day the court ordered that "this suit be sent to the Circuit Court of Cook County, Illinois, to which the attorneys for defendant object but said objection is overruled."

All of the above facts appear from the portion of the transcript of the record which is certified to by the clerk of said city court on July 3, 1920. From an endorsement on the back of the last page of this portion of the transcript it appears that the same was filed in the office of the clerk of said Circuit Court on July 6, 1920, and numbered No. B 64854. From the remaining portion of the transcript of the record, which is certified to on September 28, 1920, by the clerk of said Circuit Court, it appears that on July 6, 1920, on motion of plaintiff's attorney, the Circuit Court ordered that the time for filing a bill of exceptions be extended to September 7, 1920; that on September 3, 1920, said court, upon stipulation of the attorneys for the respective parties, ordered a further extension to September 20, 1920; that on September 17, 1920, a bill of exceptions was presented to one of the judges of said Circuit Court for signature; and that on September 24, 1920, over objection of defendant's attorneys and after a hearing, said judge signed the bill and ordered the same to be filed, which was accordingly done.

When the plaintiff's appeal bond was approved by the

the Honorable George A. Fishburn, then judge of said court. From which it appeared that defendant's attorneys had been previously notified that on said day be (said judge), of his own volition, would change the venue of the cause and send the case to the Circuit Court of Cook County," because he had acted as attorney for the plaintiff in the trial of the cause and was interested in its outcome, and that on that account it would be illegal for him as judge to enter any orders in the cause except to transfer the cause to some court to assume jurisdiction thereof. On the same day the court ordered that "this suit be sent to the Circuit Court of Cook County, Illinois, to which the attorneys for defendant object but said objection is overruled."

All of the above facts appear from the portion of the transcript of the record which is certified to by the clerk of said city court on July 3, 1920. From an endorsement on the back of the last page of this portion of the transcript it appears that the cause was filed in the office of the clerk of said Circuit Court on July 6, 1920, and numbered No. B 84884. From the remaining portion of the transcript of the record, which is certified to on September 20, 1920, by the clerk of said Circuit Court, it appears that on July 6, 1920, on motion of plaintiff's attorney, the Circuit Court ordered that the time for filing a bill of exceptions be extended to September 7, 1920; that on September 3, 1920, said court, upon stipulation of the attorneys for the respective parties ordered a further extension to September 20, 1920; that on September 17, 1920, a bill of exceptions was presented to one of the judges of said Circuit Court for signature; and that on September 24, 1920, over objection of defendant's attorneys and after a hearing, said judge signed the bill and ordered the same to be filed, which was accordingly done.

When the plaintiff's second count was argued by the

clerk of said city court and filed on May 18, 1920, as provided in the order of said city court entered April 7, 1920, the cause was in contemplation of law then pending in this appellate court. (Merrifield v. Cottage Piano Co., 238 Ill., 526, 532; Reynolds v. Perry, 11 Ill., 534, 535); and the jurisdiction of this appellate court attached and that of the city court ceased. (David v. Commercial Accident Co., 243 Ill., 43, 47.) This being so the city court had no jurisdiction to order that the cause be transferred, by change of venue, to the Circuit Court of Cook County for any purpose. And it is the law that a change of venue shall not be granted after evidence has been heard. (Richards v. Greene, 78 Ill., 525; Haley v. City of Alton, 152 Ill., 113.) It follows that the Circuit Court did not acquire any jurisdiction of the cause, in the manner attempted, and that no judge thereof had any jurisdiction or power to sign the bill of exceptions contained in the transcript of the record before us. The provisions contained in Section 81 of the Practice Act do not seemingly apply.

We feel constrained, therefore, on our own motion, to order the bill of exceptions contained in the transcript stricken from the files, and it is so ordered.

No errors are assigned or argued which are based upon the common law record, and, hence, the judgment of the City Court of Chicago Heights must be affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

clerk of said city court and filed on May 18, 1960, as provided in the order of said city court entered April 7, 1960. The cause was in contemplation of law then pending in this appellate court. Hartfield v. Fedmor Stage Co., 248 Ala. 111, 114, 26 So. 2d 2; Ex parte Ellis, 31 Ala. 234, 236; and the jurisdiction of this appellate court attached and that of the city court ceased. Smith v. Commercial Credit Co., 231 Ala. 111, 46, 47.] This being so the city court had no jurisdiction to order that the cause be transferred. In order of trial, in the Circuit Court of Cook County for any purpose. And it is the law that a change of venue shall not be granted after evidence has been heard. (Hitchcock v. Greene, 72 Ala. 328; Dafler v. City of Alton, 152 Ill. 110.) It follows that the Circuit Court did not [illegible] of the cause, in the manner attempted, and that no judge thereof had any jurisdiction or power to sign the bill of exceptions contained in the transcript of the record before us. The provisions contained in Section 81 of the Treaties are to not remotely apply.

As Ford contended, therefore, on our own motion, we strike the bill of exceptions contained in the transcript filed from the Clerk, and it is so ordered.

No errors are assigned or argued which are based upon the evidence in record. And, hence, the judgment of the Circuit Court of Orleans County must be affirmed.

AFFIRMED.

Simmons and Pittman, JJ., concur.

224 - 26397

225 - 26398

SECURITY LIFE INSURANCE COMPANY,
a corporation,
Complainant,
v.
IDA ZUCKERMAN et al.,
Defendants.

A. S. ROE,
Cross Complainant and Appellee,
v.
JOHN SALINY,
Petitioner and Appellant.

A. S. ROE,
Cross Complainant and Appellee,
v.
JOHN KAPUSTA,
Petitioner and Appellant.

CONSOLIDATED APPEALS FROM SUPERIOR COURT OF COOK COUNTY.

222 I.A. 628

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On January 3, 1918, the Security Life Insurance Company, a corporation, filed its bill in the Superior Court of Cook County to foreclose a first mortgage on certain improved premises in Chicago, Illinois, against Ida Zuckerman and Emanuel Zuckerman, her husband, makers of said mortgage and the notes secured thereby. Daniel Ettelson and A. S. Roe, the owners respectively of the second and third mortgages on the premises, and others were made parties to the bill. On February 5, 1918, the court appointed a receiver to take possession of the premises, etc. Such proceedings were thereafter had that a decree of foreclosure of the first mortgage was entered on December 3, 1918, and the premises were sold at a master's sale on December 30, 1918. The sum realized from the sale was insufficient to satisfy the amount decreed to be due complainant, and on January 6, 1919, a deficiency decree was entered against the Zuckermans and in favor of complainant. The receiver, under order of the court, continued in possession of

the premises until the period of redemption expired, collecting rents from tenants. He was authorized to pay the deficiency decree, to retain a certain sum as his compensation and to pay certain fees to his solicitor, all of which he did. His final report disclosed that he had a balance of $1,039.35 still remaining in his hands, and on May 28, 1920, the court, after a hearing before a master, ordered that the receiver pay said balance to A. S. Roe, cross-complainant. It is from said last mentioned order that the present consolidated appeals were separately prayed and perfected.

The award of said balance to A. S. Roe, owner of said third mortgage, is here questioned by John Saliny, who claims as owner of the equity of redemption by virtue of a quit claim deed and a written assignment, both executed by the Zuckermans, and by John Kapusta, who claims as owner of the second mortgage by virtue of an assignment executed by Daniel Ettelson.

On April 30, 1919, several months after the original foreclosure decree was entered, John Saliny filed an intervening petition setting up his claim; on June 30, 1919, Daniel Ettelson filed a cross bill alleging that the Zuckermans were insolvent and praying that the receiver, after having satisfied the deficiency decree, pay over to him whatever sum may remain in the receiver's possession at the expiration of the period of redemption; and on August 18, 1919, A. S. Roe filed a similar cross bill praying for substantially the same relief as to him. On the issues presented by said intervening petition and said cross-bills, and the various answers thereto, a reference was had to a master to take proofs and report his conclusions of law and fact, and on March 20, 1920, the master filed a supplemental report, wherein it is stated that the Zuckermans, although made defendants to the original bill of complaint,

the premises until the period of redemption expired, collecting rents from tenants. He was authorized to pay the deficiency decree, to retain a certain sum as his compensation and to pay certain fees to his solicitor, all of which he did. His final report disclosed that he had a balance of $1,020.35 still remaining in his hands, and on May 28, 1920, the court, after a hearing before a master, ordered that the receiver pay said balance to A. S. Foe, cross-complainant. It is from said last mentioned order that the present consolidated appeals were seasonably prayed and perfected.

The owner of said balance to A. S. Foe, owner of said third mortgage, is here represented by John Quigley, who claims as owner of the equity of redemption by virtue of a quit claim deed and a written assignment, both executed by the bankrupt, and by John Kapusta, who claims as owner of the second mortgage by virtue of an assignment executed by Daniel Ettelson.

On April 26, 1921, several months after the original foreclosure decree was entered, John Quigley filed an intervening petition setting up his claim; on June 20, 1921, Daniel Ettelson filed a cross bill alleging that the mortgages were usurious and praying that the premises, after having satisfied the deficiency decree, pay over to him whatever sum may remain in the receiver's possession at the expiration of the period of redemption; and on August 18, 1922, A. S. Foe filed a similar cross bill praying for substantially the same relief as to him. On the issues presented by said intervening petition and said cross-bills, and the various answers thereto, a reference was had to a master to take proofs and report his conclusions of law and fact, and on March 30, 1920, the master filed a supplemental report, wherein it is stated that the [illegible]

failed to answer the same and were defaulted, and that at said supplemental hearing he had admitted certain documentary evidence and had taken the testimony of John Saliny and others in Saliny's behalf, of John Kapusta and others in Kapusta's behalf, and of one witness in behalf of A. S. Roe. The master found that on April 23, 1919, the Zuckermans had conveyed and quitclaimed to Saliny all their interest in the premises in question and on the same day had assigned all their interest in the rents collected; that on August 13, 1919, Daniel Ettelson had sold and assigned all his title and interest to the principal promissory note of $4,050, executed by the Zuckermans, and the trust deed securing the same, and all interest in the decree of sale, by the terms of which decree it was found there was due and owing said Ettelson on said note the sum of $2,467, and which said trust deed "contains no provision pledging the rents accruing after sale and before the time for redemption expires as security for the note secured by said trust deed"; that at the hearing before the master said "Ettelson did not appear, either personally or by counsel, and offered no evidence," and that the only evidence offered in connection with said Ettelson trust deed was offered by John Kapusta, to the effect that Ettelson had made the assignment above mentioned to Kapusta; that "Kapusta has filed no petition, cross-bill or pleading of any kind in this proceeding;" and that the trust deed from the Zuckermans to A. S. Roe conveyed the premises in question "together with all rents, issues and profits of said premises." And the master found as a matter of law, based on the foregoing findings of facts, (1) that neither Ettelson nor Kapusta were entitled to the relief prayed for in Ettelson's cross-bill; (2) that A. S. Roe was entitled to the relief prayed for in his cross-bill, and that, after paying the deficiency decree, the receiver's expenses and the master's fees, etc. the money in the receiver's hands should be applied

failed to answer the same and were defaulted, and that at said supplemental hearing he had admitted certain documentary evidence and had taken the testimony of John Bailey and others in Bailey's behalf, of John Kapusta and others in Kapusta's behalf, and of one witness in behalf of A. S. Roe. The master found that on April 25, 1919, the Mockermans had conveyed and quitclaimed to Bailey all their interest in the premises in question and on the same day had assigned all their interest in the rents collected; that on August 13, 1919, Daniel Ettelson had sold and assigned all his title and interest to the principal promissory note of $4,000, executed by the Mockermans, and the trust deed securing the same, and all interest in the decree of sale, by the terms of which decree it was found there was due and owing said Ettelson on said note the sum of $2,427, and which said trust deed "contains no provision pledging the rents accruing after sale and before the time for redemption expires as security for the note secured by said trust deed"; that at the hearing before the master said "Ettelson did not appear, either personally or by counsel, and offered no evidence," and that the only evidence offered in connection with said Ettelson trust deed was offered by John Kapusta, to the effect that Ettelson had made the assignment above mentioned to Kapusta; that "Kapusta has filed no petition, cross-bill or pleading of any kind in this proceeding;" and that the trust deed from the Mockermans to A. S. Roe conveyed the premises in question "together with all rents, issues and profits of said premises." And the master found as a matter of law, based on the foregoing findings of fact, (1) that neither Ettelson nor Kapusta were entitled to the relief prayed for in Ettelson's cross-bill; (2) that A. S. Roe was entitled to the relief prayed for in his cross-bill, and that, after paying the deficiency decree, the receiver's expenses and the master's fees, the proceeds in the receiver's hands should be applied

to the payment of the amount found due said Roe, (viz. $1,070. 42 and interest) in the decree of sale; and (3) that the overplus, if any, remaining in the receiver's hands after making said payments, should be turned over to Saliny, as assignee of the equity of redemption. Saliny's objections to the master's report were overruled and ordered to stand as exceptions before the court. On May 6, 1920, on the petition of Kapusta, the court ordered that he, as assignee of Daniel L. Ettelson, be substituted for said Ettelson, defendant herein. Neither Ettelson nor Kapusta filed any objections or exceptions to the master's report. In the order appealed from, entered May 28, 1920, the court confirmed and approved the master's report; found that the equities of the case were with the cross-complainant Roe, that there was due him the total sum of $1,236.34, and that the receiver had on hand the sum of $1,039.35, as appears from his final account; and ordered and decreed that said receiver turn over to Roe said sum of $1,039.35, in part satisfaction of the amount found due to Roe. And it appearing that said receiver has collected other rents after the expiration of the period of redemption, and that one Meyer Abrams as redeeming judgment creditor has obtained a deed for the premises pursuant to his said redemption and is entitled to the immediate possession thereof and to the funds in the receiver's hands collected since the filing of his final account and after the expiration of the period of redemption, the court further ordered and decreed that the receiver turn over to said Abrams all monies collected since the expiration of said period and also the possession of said premises; and that said receiver "be discharged as receiver * * upon filing receipts for the turning over of the said funds to A. E. Roe, cross-complainant, and Meyer Abrams as redeeming judgment creditor."

It is first contended by counsel for Saliny, assignee of the equity of redemption, as ground for a reversal of the order appealed from, that there is no pledging of the rents

to the payment of the amount found due said Doe, (viz. $3,070.42 and interest) in the decree of sale; and (2) that the overplus, if any, remaining in the receiver's hands after selling said property, should be turned over to Kelly, as assignee of the equity of redemption. Kelly's objections to the master's report were overruled and evidence to admit as exceptions before the court. On May 6, 1920, on the petition of Kelly, the court ordered that he, as assignee of Daniel L. Kibler, be substituted for said Kibler, defendant herein. Neither Kibler nor Kelly filed any exceptions or excepting to the master's report. In due time appeals from entered May 20, 1920, the court confirmed and approved the master's report; found that the equities of the case were with the cross-complainant Doe, that there was due him the total sum of $3,[illegible].64, and that the receiver had on hand the sum of $3,019.55, so appears from the final accounting, and ordered and decreed that said receiver turn over to the said sum of $3,[illegible].55, in part satisfaction of the amount found due to Doe. And it appearing that said receiver has collected other rents after the expiration of the period of redemption, and that one Kelly claims as redemptioning judgment creditor has obtained a deed for the premises pursuant to his said redemption and is entitled to the immediate possession thereof and to the funds in the receiver's hands collected since the filing of his final account and after the expiration of the period of redemption. The court further ordered and directed that the receiver pay to said Doe all moneys collected since the expiration of said period and also the possession of said premises; and that said receiver "be discharged as receiver" - upon filing vouchers for the payment over of the said funds to A. S. Doe, cross-complainant, and Kelly claims as redemptioning judgment creditor."

It is first contended by counsel for Kelly, assignee of the equity of redemption, as stated in a letter of the

[illegible]

under the terms of the Roe trust deed. By the first clause in the deed the Zuckermans convey the premises in question to Roe, as trustee, "together with all rents, issues and profits of said premises." and it provided that, in the event of a breach of any of certain covenants mentioned, the whole of the principal indebtedness of $1,350, and all earned interest, shall, at the option of the legal holder thereof, become immediately due and shall be recoverable by foreclosure hereof, or by suit at law, or both. And the deed contains the following clause:

> "The grantors waive all right to the possession of and income from said premises pending such foreclosure proceedings, and until the period of redemption from any sale thereunder expires, and agree that upon the filing of any bill to foreclose this trust deed, a receiver shall * * be immediately appointed, * * to take possession or charge of said premises, and collect such income, and the same, less receivership expenditures, * * to pay to the person entitled thereto in reduction of the inedbtedness hereby secured, in reduction of the amount of any decree of sale entered in any foreclosure proceeding, in payment or reduction of any deficiency after a master's or commissioner's sale under any decree of sale, or in payment or reduction of any deficiency decree entered thereon."

It is argued that under this clause the pledging of the rents is made conditional upon the filing of a bill to foreclose "this trust deed," and applicable only in the event that such a bill is filed, that no bill was filed to foreclose the Roe trust deed, that the Roe cross-bill was filed after the sale of the premises by the master and did not pray any relief by way of foreclosure but amounted practically to an intervening petition to secure a fund, and that, hence, the rents collected during the period of redemption, beyond the sums necessary to pay the deficiency decree and expenses, is the property of the owner of the equity of redemption, who is Saliny, assignee of the Zuckermans. We cannot agree with the major premise or the conclusion. By the first clause in the Roe trust deed the rents and profits of the premises were expressly conveyed, and by the clause last above set forth the Zuckermans waived all right to the income from the

under the terms of the due trust deed. By the first clause in the deed the mortgagors convey the premises in question to Doe, as trustee, "together with all rents, issues and profits of said premises." And it provided that, in the event of a breach of any of certain covenants mentioned, the whole of the principal indebtedness of $1,000, and all accrued interest, shall, at the option of the legal holder thereof, become immediately due and shall be recover-ble by foreclosure hereof, or by suit at law, or both.

And the deed contains the following clause:

> "The grantors waive all right to the possession of and income from said premises pending such foreclosure proceedings, and until the period of redemption from any sale thereunder expires, and agree that upon the filing of any bill to foreclose this trust deed, a receiver shall, * * be immediately appointed, * * to take possession or charge of said premises, and collect such income, and the same, less reasonably expenditures, * * to pay to the person entitled thereto in redemption of the indebtedness hereby secured, in reduction of the amount of any decree of sale entered in any foreclosure proceeding, in payment or reduction of any deficiency after a master's or commissioner's sale under any decree of sale, or in payment or reduction of any deficiency decree entered thereon."

It is argued that under this clause the pledging of the rents is made conditional upon the filing of a bill to foreclose "this trust deed," and applicable only in the event that such a bill is filed, that no bill was filed to foreclose the Doe trust deed, that the Doe trust-bill was filed after the sale of the premises by the master and did not pray any relief by way of foreclosure but amounted practically to an intervening petition to secure a fund, and that, hence, the rents collected during the period of redemption, beyond the sums necessary to pay the deficiency decree and expenses, is the property of the owner of the equity of redemption, who is Bailey, assignee of the Blommers. We cannot agree with the major premise or the conclusion. By the first clause in the Doe trust deed the rents and profits of the premises were expressly conveyed, and by the clause last above

premises pending foreclosure proceedings and until the period of redemption from any sale expired. By the terms of the foreclosure decree, entered December 3, 1918, the court found that the lien of the Roe trust deed was prior and superior to the rights and claims of all parties to the proceeding other than the complainant and the defendant, Ettelson, and that there was due to Roe the sum of $1,070.42, and costs and expenses. And on August 18, 1919, Roe filed a cross-bill praying that the receiver, after having satisfied the deficiency decree, etc., be ordered to pay over to him whatever sum might remain in the receiver's possession at the expiration of the period of redemption. As against the assignee of the owner of the equity of redemption we think that Roe, under the facts disclosed, is entitled to the balance of the monies in the receiver's hands. (Owsley v. Neeves, 179 Ill. App., 61, 64; Continental and Commercial Trust and Savings Bank v. Leven, 213 Ill. App., 310, 314; Cowell v. Gnatzig, 178 Ill. App., 482, 485.)

It is also contended by counsel for Saliny that, as appears from the order continuing the receivership, the same was only for the benefit of the complainant, owner of the first mortgage, whose debt had not been satisfied in full by the sale of the premises; that the receivership was not extended to the junior incumbrances but was limited to the first; and, the deficiency owing to the owner of the first mortgage having been paid in full, that the balance of the funds in the receiver's hands belongs to Saliny, as assignee of the owner of the equity of redemption. The order continuing the receivership was entered on January 6, 1919, on the same day of the entry of the deficiency decree. It directs that E. Waltersdorf be continued as receiver of the premises, and of the rents, issues and profits thereof, "until said amount due complainant under said deficiency

decree, together with all costs and expenses incurred by said receiver including his fees, have been paid in full, or in the event that the rents, issues and profits * * shall not be sufficient to pay the amount due complainant and said receiver's expenses and fees, then until the time to redeem the said premises from the sale heretofore made * * shall expire." We do not think there is any merit in the contention. The original order of the court, entered February 5, 1918, appointing the receiver was general in its character. In Coates v. Cunningham, 80 Ill., 467, 468, it is held that an appointment of a receiver does not determine any right or effect the title of either party, that he is an officer of the court and appointed on behalf of all parties, and that he retains possession of the property for the benefit of the party ultimately entitled. In Roach v. Glos, 181 Ill., 440, 447, it is said:

> "When a receiver is appointed in a suit to foreclose a first mortgage, the second mortgagee being a party, and the first mortgage is satisfied out of the proceeds of the foreclosure sale, leaving the second mortgage unpaid, either altogether or in part, resort may be had, for the deficiency upon the second mortgage, to the rents collected by the receiver. In such case, if the first mortgagee, who has procured the receiver and has a right to satisfy his debt either out of the proceeds of the sale or out of the rents collected by the receiver, elects to take the proceeds of sale, the second mortgagee is entitled to be subrogated to the rents."

In the present case the receiver was appointed in a suit started to foreclose the first mortgage, and Attelson, the second mortgagee, and Roe, the third mortgagee, were made parties, and they answered setting up their respective claims. The court in the foreclosure decree found the respective amounts due on the three mortgages and that the lien of Roe, the third mortgagee, was superior to the rights and claims of all parties to the proceeding, other than the complainant and the second mortgagee, Attelson. The amount realized at the sale was insufficient to

dency, together with all costs and expenses incurred by said receiver including his fees, have been paid in full, or in the event that the sum, large or nothing * * shall not be sufficient to pay the costs and expenses and said receiver's expenses and fees, then until the time to redeem the said premises from the sale here/before made * * shall expire." We do not think there is any merit in the contention. The original motion of the party, dated February 2, 1931, mentioning the receiver was general in its character. In Cooper v. Hunkins, 53 Ill., 267, 268, it is held that an appointment of a receiver does not determine any right or affect the title of either party, that he is an officer of the court and appointed on behalf of all parties, and that he retains possession of the property for the benefit of the party ultimately entitled. In Tuck v. Kane, 101 Ill., 167, it is said:

> "When a receiver is appointed in a suit to foreclose a first mortgage, the second mortgagee being a party, and the first mortgage is satisfied out of the proceeds of the foreclosure sale, leaving the second mortgage unpaid, either altogether or in part, recourse may be had, for the deficiency upon the second mortgage, to the funds collected by the receiver. In such case, if the first mortgagee, who has procured the receiver and has a right to satisfy his debt either out of the proceeds of the sale or out of the funds collected by the receiver, elects to take the proceeds of sale, the second mortgagee is entitled to be subrogated to the rights."

In the present case the receiver was appointed in a suit started to foreclose the first mortgage, and Stehlmann, the second mortgagee, and Doe, the third mortgagee, were made parties, and they answered setting up their respective claims. The court in the foreclosure decree found the respective amounts due on the three mortgages and that the lien of Doe, the third mortgagee, was superior to the rights and claims of all parties to the proceeding, other than the complainant and the second mortgagee,

satisfy the amount due the first mortgagee and a deficiency decree was entered and the receivership was continued. Subsequently, both Ottelson and Roe filed cross-bills separately praying that the receiver, after having satisfied the deficiency decree, pay over to them whatever sums might remain in the receiver's hands at the expiration of the redemption period. Subsequently, the deficiency decree was paid out of rents collected by the receiver during the period of redemption and there remained a balance in his hands. In the Roe mortgage the rents were expressly pledged. Under these facts and under the law we think that Roe, as against the assignee of the owner of the equity of redemption, is entitled as a junior mortgagee to said balance in the receiver's hands.

It is further contended by counsel for Saliny that Roe's cross-bill of August 18, 1919, not having been filed until after the expiration of the term at which the foreclosure decree was entered and the expiration of the term at which the sale was confirmed and the deficiency decree entered, was filed too late. We think that the case of Ruprecht v. Muhlke, 225 Ill., 188, 195, is decisive of this point against counsel's contention. Other points are urged by counsel for Saliny, but we think that they are without merit.

We deem it unnecessary to discuss the various points urged, as grounds for a reversal of the order appealed from, by counsel for John Kapusta, owner of the second mortgage by assignment from Daniel Ottelson, dated August 13, 1919. We have examined the Ottelson trust deed and we agree with the finding of the master that said trust deed "contains no provision pledging the rents accruing after sale and before the time for redemption expires as security for the note secured by said trust deed." There is a provision therein directing the payment of rents,

that may be collected after sale and before the time of redemption expired, "to the purchaser or purchasers of said premises at such sale or sales." This is not a pledging of the rents to Ettelson during said period. (Longley v. Wilk, 171 Ill. App., 419; Baldwin v. Tuttle, 215 Ill. App., 57; Standish v. Musgrove, 283 Ill, 500. And his assignee, Kapusta, has no greater rights than he. Furthermore, it appears that on the supplemental hearing before the master Ettelson was not present, either personally or by counsel, and offered no evidence; and that the only evidence offered by Kapusta at said hearing, in connection with the Ettelson trust deed, was to the effect that Ettelson, on August 15, 1919, had sold and assigned all interest in his Auckerman note, and the trust deed securing the same, and all his interest in the decree of sale. Furthermore, it does not appear that either Ettelson or Kapusta filed any objections or exceptions to the master's supplemental report. In Cheltenham Improvement Co. v. Whitehead, 128 Ill., 279, 285, it is said: "The master's report must be held conclusive of all questions covered by it not excepted to." We are of the opinion that, as regards the rights of the appellant, John Kapusta, the Superior Court did not err in entering the order appealed from.

After the two appeals from said order had been consolidated in this appellate court the appellee, Roe, filed motions to dismiss each of said appeals, as per written suggestions made. The motions were reserved to the hearing. We have considered the motions and suggestions and are of the opinion the motions should be denied. The clerk will accordingly enter an order in each case to that effect.

For the reasons above stated the order of the Superior Court, entered May 28, 1920, on the appeal of John Saliny, No. 26397, is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

that may be collected after sale and before the time of redemption expired, "to the purchaser or purchasers of said premises at such sale or sales." This is not a pledging of the rents to attaches during this period. (Lawler v. Hill, 177 Ill. App., 419; Sheldon v. Tuttle, 108 Ill. App., 27; Bloomish v. Spencer, 202 Ill. 588. And his mortgagee, Kapusta, has no greater rights than he. Furthermore, it appears that on the supplemental hearing before the master Ottelson was not present, either personally or by counsel, and offered no evidence; and that the only evidence offered by Kapusta at said hearing, in connection with the Ottelson trust deed, was to the effect that Ottelson, on August 13, 1919, had sold and assigned all interest in his Dickerman note, and the trust deed securing the same, and all his interest in the decree of sale. Furthermore, it does not appear that either Ottelson or Kapusta filed any objections or exceptions to the master's supplemental report. In Chicago Improvement Co. v. Chicago, 188 Ill., 279, 285, it is said: "The master's report must be held conclusive of all questions covered by it not excepted to." We are of the opinion that, as regards the rights of the appellant, John Kapusta, the Superior Court did not err in entering the order appealed from.

After the two appeals from said order had been consolidated in this appellate court the appellee, Roe, filed motions to dismiss each of said appeals, as per written suggestions made. The motions were reserved to the hearing. We have considered the motions and suggestions and are of the opinion the motions should be denied. The clerk will accordingly enter an order in each case to that effect.

For the reasons above stated the order of the Superior Court, entered May 16, 1930, on the appeal of John Zaikny, Ex. 20397, is affirmed.

ase No. 17850] 26 397

3M 2-18-21

Suit to foreclose a first mortgage. Receiver appointed, foreclosure [illegible] premises sold and a deficiency decree [illegible] the receiver, showing [illegible] and expenses, [illegible] to the owner of a third mortgage [illegible]

Error to the Municipal Court of Chicago;
Superior Court of Cook county;
Appeal from the Circuit Court of county;
County Court of county:
the Hon. , Judge, presiding. Heard
in the Branch Appellate Court
this court at the term.

222 I.A. 628

Affirmed
Reversed
Reversed and remanded with directions.

Opinion filed Rehearing denied

for appellants.

for plaintiffs in error.

for appellees.

for defendants in error.

RESIDING JUSTICE delivered the opinion of the court.

supplemental report. In Chellenham Improvement Co. v. Hilchenal, 139 Ill., 279, 288, it is said: "The master's report must be held conclusive of all questions covered by it not excepted to." We are of the opinion that, as regards the rights of the appellant, John Kepneis, the Superior Court did not err in entering the order appealed from.

After the two appeals from said order had been consolidated in this appellate court the appellee, Roe, filed motions to dismiss each of said appeals, on per written suggestions made. The motions were reserved to the hearing. We have considered the motions and suggestions and are of the opinion the motions should be denied. The clerk will accordingly enter an order in each case to that effect.

For the reasons above stated the order of the Superior Court, entered May 28, 1930, on the appeal of John Kaiser, No. 28290, is affirmed.

225 - 26398

SECURITY LIFE INSURANCE COMPANY,
a corporation,
Complainant,

vs.

IDA ZUCKERMAN et al.,
Defendants.

A. S. ROE,
Cross Complainant and Appellee,

vs.

JOHN KAPUSTA,
Petitioner and Appellant.

222 I.A. 628

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

For the reasons indicated in the opinion this day filed in case No. 26397, the motion of the appellee, A. S. Roe, to dismiss the appeal of John Kapusta, which was reserved to the hearing, is denied.

And for the reasons indicated in said opinion, the order of the Superior Court, entered May 28, 1920, on the appeal of John Kapusta, is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

251 - 26424

FLORENCE KELLEY, Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT
FRANCES P. GREGSTEN, Appellant.	)	COOK COUNTY.

222 I.A. 629

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the Court.

This is an appeal from a judgment for $3000 rendered against defendant by the Circuit Court of Cook County on March 20, 1920, in an action for damages for personal injuries sustained on October 14, 1916, by plaintiff, who was a tenant under written lease occupying the third floor flat in an apartment building owned by defendant in the city of Chicago. While plaintiff was hanging some clothes on a line on the rear porch of the flat, a portion of an old and defective fence or railing gave way and she fell to the ground and suffered serious and permanent injuries.

The negotiations prior to the signing of the lease were had with J. J. Moran, who was the agent of the landlord and had general charge of the building. The porch and the fence or railing were part of the demised premises and for the exclusive use of the tenant's family.

The case has been tried twice. On the first trial the jury returned a verdict for plaintiff for $2500, but a new trial was granted. On the second trial the jury returned a general verdict finding the defendant guilty and assessing plaintiff's damages at $5000, and the jury answered two special interrogatories submitted as follows:

"Did Moran, the agent, know of the defective condition of the railing, if any, at the time of the execution of the lease?
Yes.
Was the defect in the railing, if any, an obvious defect which could have been discovered by a careful examination of the premises?
No."

The verdict was reduced by a <u>remittitur</u> of $2000 and the judgment appealed from was entered for $3000. At the close of

plaintiff's evidence and again at the close of all the evidence defendant moved for a directed verdict in her favor but the motions were denied.

As appears from the five counts of the declaration, plaintiff's theory as to her right to recover damages was in substance that at the time of the leasing of the premises it was defendant's duty to see that the same were in reasonably safe repair and condition, or to advise plaintiff of all latent defects or dangerous conditions; that, not regarding her duty, defendant by her agent negligently leased said premises without calling to plaintiff's attention the worn out and dangerous condition of said fence or railing, of which condition defendant or her agent knew or by the exercise of reasonable care might have known, and of which dangerous condition plaintiff did not know because the defects in said fence or railing were latent; and that, while plaintiff was attending to her duties as a housewife and was in the exercise of due care for her own safety, said fence or railing gave way because of said latent defects therein, and she fell, etc.

The lease was signed by the parties on May 5, 1916, for a period ending April 30, 1917. In consideration of the demise plaintiff covenanted, inter alia,(a) that she has examined and knows the condition of the premises and has received the same in good order and repair; (b) that no representations as to the condition or repair thereof have been made by the landlord or her agent prior to the execution of the lease; (c) that she will keep the premises in good repair during the term at her own expense, and upon the termination of the lease will yield up the premises in good condition and repair, loss by fire and ordinary wear excepted; (d) that the landlord shall not be liable for any damage occasioned by failure to keep said premises in repair; and (e) that she (plaintiff) will allow the landlord free access

thereto which she may see fit to make.

In Sunnseack v. Morey, 196 Ill. 569, 571, it is said:

"The law is well settled that the rule of caveat emptor applies to a contract of letting, and the landlord is not bound to make repairs unless he has assumed such duty by express agreement with the tenant. The tenant takes the premises as he finds them, subject to his own risk, and there is no implied covenant on the part of the landlord that they are fit for habitation or fit for the purposes for which they are rented, or that they are in any particular condition. The landlord is therefore not liable for damages resulting to the tenant by reason of the demised premises being out of repair, unless he has expressly bound himself to make repairs by the terms of the contract to let. Where, however, there are concealed defects in the demised premises, attended with danger to an occupant, which a careful examination would not disclose but which are known to the landlord, the latter is under obligation, imposed upon him by law, to reveal them to the tenant in order that he may guard against them, and upon the landlord's failure to perform such duty he will become liable for whatever damages actually result to the tenant therefrom."

In the present case it appears, by a clear preponderance of the testimony even of plaintiff's witnesses, that from the time plaintiff first saw the premises just prior to the executionof the lease until the time of the accident, the defects and dangerous condition of said fence and railing were so obvious that a careful examination, indeed a cursory one, would have disclosed them. And by the terms of the lease in question it was expressly provided that the plaintiff would keep the premises in repair and that the defendant should not be liable for any damage occasioned by a failure to keep the same in repair. In Booth v. Merriam, 155 Mass. 521, it appears that the tenant of a dwelling house while crossing the yard about three months after hiring the premises stepped upon the cover of a cesspool which she did not know was there, and the cover giving way, she fell in and was injured; that the cover was of iron, level with the surface of the ground, and was set in a wooden frame; and that the accident happened solely because the frame was old and out of repair. It was held that the landlord was not liable for her injuries, the court saying (p. 523): "It was as much the duty of the plaintiff, when she hired the house and yard, to examine

the premises and ascertain whether they were in such repair that she could safely use them, as of the defendant. The case is similar to Bowe v. Hunking, 135 Mass. 380, and it falls within the general rule that a tenant cannot recover for an injury received by reason of the want of repair of the premises hired."

Such being the law, and applying it to the facts as disclosed in the present record, we feel constrained to reverse the judgment of the Circuit Court and it is so ordered.

REVERSED.

BARNES, J., and MORRILL, J., concur.

251 - 26424

FINDING OF FACT. We find as an ultimate fact in the present case that the defects in the fence or railing on the back porch of the premises in question were, from the time plaintiff first saw said premises just prior to the execution of the lease in question and until the time of the accident, obvious and not latent defects.

261 - 26435

EDWARD M. WEYER and JOHN F. TOONEY, trading as Weyer & Tooney Knitting Co., Appellees,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
NATHAN R. SIEGEL, trading as Gibralter Knitting Co., Appellant.	

222 I.A. 629

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted to reverse a judgment for $150 rendered against defendant by the Municipal Court of Chicago. To plaintiffs' claim of $150 for merchandise sold and delivered defendant filed a set-off claiming damages in the sum of $269.16, occasioned by plaintiffs' failure to deliver the balance of the merchandise ordered, and that after deducting the amount of plaintiffs' claim there was due defendant the net sum of $119.16. The trial court refused to allow the set-off.

In February, 1917, defendant ordered from plaintiffs 50 dozen sweaters at $33 per dozen, and plaintiffs promised to make deliveries about May 15, 1917, and defendant promised to make payments 30 days after deliveries. It appears that the deliveries were delayed with the acquiescence of defendant; that the first delivery was made in October, 1917, but payment therefor was not made until August, 1918; that a second delivery of sweaters, worth $150 at the contract price, was made in May, 1918, but defendant never paid for the same although often requested; that 34 1/6 dozen sweaters out of the 50 dozen ordered were delivered to defendant; that plaintiffs refused to deliver the balance until payment was received for the amount of the second delivery, $150; that defendant demanded the balance be delivered before he paid the $150; and that in December, 1918, plaintiffs brought the present

EDWARD H. RYAN and JOHN
F. TOOHEY, trading as Ryan
& Toohey Building Co.,
appellees.

vs.

ARTHUR STEM
Building Co.
of Appellees.

ER. INSUFFICIENT EVIDENCE PRESENTED THE CRITERIA OF THE COURT.

This appeal is prosecuted to reverse a judgment for $1250 rendered against defendant by the Municipal Court of Chicago, in plaintiffs' claim of $1[illegible] for workmanship made and delivered defendant filed a set-off claiming damages in the sum of $2520.10, occasioned by plaintiffs' failure to deliver the balance of the automobile sheets, and also other materials the amount of plaintiffs' claim there was due defendant the sum of $[illegible]. The trial court refused to allow the set-off.

In February, 1921, defendant ordered five thousand dozen sweaters at $[illegible] per dozen, and plaintiffs promised to make deliveries about May 15, 1921, and defendant promised to make payments 30 days after delivery. It appears that the deliveries were delayed with the acquiescence of defendant; that the first delivery was made in October, 1921, but payment therefor was not made until August, 1922; that a second delivery of sweaters, worth $[illegible] at the contract price, was made in May, 1922, but defendant never paid for the same although often requested; that of 1[illegible] dozen sweaters out of the 5[illegible] dozen ordered were delivered to defendant; that plaintiffs refused to deliver the balance unless payment was received for the second of the second delivery, [illegible]; that defendant demanded the balance be delivered before he paid the

action.

We are of the opinion that under the facts disclosed the court was fully warranted in disallowing defendant's claim of set-off. Plaintiffs were excused from making further deliveries under the contract because of defendant's refusal to pay the sum of $150 due for sweaters already delivered and they were entitled to recover upon the contract as far as they had performed it. (Lake Shore & Michigan Southern Ry. Co. v. Richards, 152 Ill., 59; Bradley v. King, 44 Ill., 339; Rubin Bros. Mnfg. Co. v. A. J. Johnson & Sons Co., 167 Ill. App., 622.) Furthermore, defendant did not prove that he was damaged because of the non-delivery of the balance of the sweaters. Although he introduced evidence showing that their market value had advanced considerably over the contract price, he did not show that he had been obliged to purchase in the open market other sweaters at a price in excess of the contract price, or that he had been damaged in any definite sum. It was incumbent on him to prove his actual damages, (City of Joliet v. Fox, 135 Ill. App., 444), and he did not do so.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

action.

We are in the minority that would use the fair standard the court was fully warranted in disallowing defendant's claim of set-off. Plaintiffs were damaged from making further delivery which made the benefit between of defendant's contract to be the sum of $187 due for materials already delivered and they were entitled to recover upon the contract as far as they had performed it. (Lake Shore & Michigan Southern Ry. Co. v. Richardson, 136 Ill., 89; Hoffman v. Adam, 41 Ill., 268; Smith Bros. Mfg. Co. v. Ed. A. Johnson & Bros. Co., 167 Ill. App., 633.) Furthermore, defendant did not prove that he was damaged because of the non-delivery of the balance of the machinery. Although the evidence evidence showed that small plunger rods had leaked somewhat over the contract price, he did not show that he had been obliged to purchase in the open market other machinery at a price in excess of the contract price, or that he had been damaged in any definite sum. It was incumbent on him to prove his actual damage. (Ellis of Ft. Wayne v. Ham, 185 Ill. App., 441), and he did not do so.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Lawrence and Smith, J.J., concur.

18 - 25889

222 I.A. 629

JOHN F. KRZEWINSKI,
Defendant in Error,

vs.

GEORGE and MARY DORUFF et al.,
Plaintiffs in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a suit to foreclose a trust deed in the nature of a mortgage. The trustee, an indispensable party to the proceeding, (Lambert v. Lambert, 22 Ill. App. 616; Ribon v. C. R. I. & P. R. R. Co., 16 Wallace, 446; Gardner v. Brown, 21 id. 36) was not made a party to the suit. It is the duty of complainant to see that all necessary parties are before the court, and where a decree is taken without making them parties defendant and they are disclosed to him, the decree will be reversed, (Brown et al. v. Riggin et al., 94 Ill. 560; Atkins et al. v. Billings, executor, etc., 72 id. 597) and an objection that there is a lack of necessary parties may be taken even on appeal or on error. (Knopf v. Chicago R. M. Board, 173 Ill. 196.) Hence the decree must be reversed and the cause remanded for want of a necessary party, regardless of any other question raised.

Plaintiffs in error were the makers of the note secured by said trust deed. They entered their appearance after service of summons, and were subsequently defaulted, apparently for want of answer. At a later term the suit was dismissed for want of prosecution, but during the same term reinstated on motion of complainant's attorney. After entry of the decree of foreclosure plaintiffs in error again entered appearance by another counsellor and moved to vacate said decree. The motion was denied. The point is made that the reinstatement was made without notice to plaintiffs in error.

This was a suit to foreclose a trust deed in the nature of a mortgage. The trustee, an indispensable party to the proceeding, (Lambert v. Lambert, 4 Ill. App. 114; Crow v. J. J. & F. E. R. R. Co., 14 Wallace, 466; Harmon v. Brown, 21 Ia. 56) was not made a party to the suit. It is the duty of complainant to see that all necessary parties are before the court, and where a decree is taken without making them parties defendant and they are disclosed in time, the decree will be reversed. (Lemon v. Steele et al., 71 Ill. 267, Jones et al. v. Williams, Executor, etc., 72 Ia. 597) and an objection that there is a lack of necessary parties may be taken even on appeal or on error. (Knox v. Gibson E. E. Board, 172 Ill. 196.) Hence the decree must be reversed and the cause remanded for want of a necessary party, regardless of any other meritorious errors.

Plaintiffs in error were the makers of the note secured by said trust deed. They entered their appearance after service of summons, and were subsequently defaulted, apparently for want of answer. At a later term the suit was dismissed for want of prosecution, but during the same term reinstated on motion of complainant's attorney. After entry of the decree of foreclosure plaintiffs in error again entered appearance by another counsellor and moved to vacate said decree. The motion was denied. The point is made that

There is nothing in the record to indicate that they did not receive proper notice, and the point seems to be made here for the first time. In this state of the record we shall indulge the presumption of regularity in the proceedings.

Complaint is made that the sum decreed to be due included an allowance of $500 for counsellors' fees and that the amount of the decree was excessive. The trust deed provided for reasonable solicitors' fees in case of foreclosure, and there is nothing in the record to indicate that the sum allowed therefor was unreasonable.

Nor do we see that there was any abuse of discretion by the court in the appointment of a receiver, or that plaintiffs in error have any real grounds of complaint so far as their individual rights are concerned. However, there must be a reversal and remandment for the reason above stated, with directions for such proceedings as are consistent with this opinion.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

There is nothing in the record to indicate that they did not receive proper notice, and the point seems to be made here for the first time. In this state of the record we shall indulge the presumption of regularity in the proceedings.

Complaint is made that the sum decreed to be due included an allowance of $300 for commissioners' fees and that the amount of the decree was excessive. The trust deed provides for reasonable solicitors' fees in case of foreclosure, and there is nothing in the record to indicate that the sum allowed therefor was unreasonable.

Nor do we see that there was any abuse of discretion by the court in the appointment of a receiver, or that plaintiffs in error have any real grounds of complaint so far as their individual rights are concerned. However, there must be a reversal and procedendo for the reason above stated, with directions for such proceedings as are consistent with this opinion.

REVERSED AND REMANDED.

Grafton, J. L., and Barrett, J., concur.

283 - 26055

Certified copy

RAYMOND BUDIL, a Minor, by Edward Budil, his Next Friend, Appellee,	)	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.
vs.	)	
CITY OF CHICAGO, Appellant.	)	

222 I. A. 629

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a personal injury suit brought in behalf of a minor against the City of Chicago. The verdict and judgment were for $27,500. The city offered no evidence in defense and moved for a directed verdict, and later for a new trial.

It is argued here (1) that the evidence fails to show the negligence charged; (2) that the verdict was excessive, and (3) that a new trial should have been granted.

1. In the first count of the declaration it is charged in substance that the city negligently permitted a certain wire used by it to transmit high voltage electricity for lighting purposes to be suspended without properly insulating, guarding or protecting it, etc. The case went to trial on this and certain additional counts charging substantially the same negligence with varying amplification of the alleged facts and conditions under which the injury was caused. The main facts alleged and relied on are that the wire was suspended in a public street above a sidewalk and passed through or in close proximity to the branches of a tree in the street, and that the boy, then of the age of nine years, in climbing the tree came in contact with the wire and received a current of electricity.

While counsel for appellant assert as their theory

283 - 26088

MAXIMUM MUDDIE, a Minor, by Howard Buddie, his next friend, Appellee,	
vs.	
CITY OF CHICAGO, Appellant.	

Appeal from the Circuit Court of Cook County.

This is a personal injury suit brought in behalf of a minor plaintiff. The jury returned a verdict for plaintiff in the sum of $27,500. The city offered no evidence in defense and moved for a directed verdict, and later for a new trial.

It is argued here (1) that the evidence fails to show the negligence charged; (2) that the verdict was excessive, and (3) that a new trial should have been granted.

I. In the first count of the declaration it is charged in substance that the city negligently permitted a certain wire used by it to transmit high voltage electricity for lighting purposes to be suspended without properly insulating, guarding or protecting it, etc. The case went to trial on this and certain additional counts charging in substantially the same negligence with varying amplification of the alleged facts and conditions under which the injury was caused. The main facts alleged and relied on are that the wire was suspended in a public street above a sidewalk and passed through or in close proximity to the branches of a tree in the street, and that the boy, then of the age of nine years, in climbing the tree came in contact with the wire and received a current of electricity.

While counsel for appellant assert as their theory

that the boy received an electric shock while climbing a metal pole carrying the wire that was near the tree yet there was no evidence to that effect, and the evidence adduced by plaintiff on which the verdict was based - as none was offered by defendant - justified the conclusion that the shock was received while the boy was climbing the tree.

While the declaration also alleges, and the proof tends to show, that the tree by reason of its size and inclining trunk was attractive to boys for climbing, yet the declaration is not predicated upon the theory of an attractive nuisance, and appellant's argument on that subject need not be considered. Such averments and proof appropriately bear on the question of the city's knowledge of the temptation and danger and whether it should not have anticipated the necessity of protecting or guarding the wire against such danger, whether by proper insulation or otherwise. (N. Y., N. H. & Hartford R. R. Co. v. Fruchter, 271 Fed., 418.) The proof, therefore, tended to support the charge that the boy received the electric current from the wire while in the tree, and so sustains the charge.

As the boy was no trespasser cases cited by appellant relating to injuries received while trespassing on private property are not in point. The tree was on a public street between the sidewalk and roadway. That the boy had the right to play in the street, and that it is natural and not unusual for a boy to climb a tree will not be questioned. "What is not unusual is to be anticipated." (Brennan v. Streator, 256 Ill., 468.)

Nor is it a case, like some cited by appellant, of deliberately reaching out for and taking hold of the wire. The inference from the testimony is that the moving of the branches caused by the climbing brought either them or the boy in con-

that the boy received an electric shock while climbing a metal pole carrying the wire that was near the tree yet there was no evidence to that effect, and the evidence adduced by plaintiff on which the verdict was based - as none was offered by defendant - justified the conclusion that the shock was received while the boy was climbing the tree.

While the decisions also differ, and are proof tends to show, that the tree by reason of its size and holding branch was attractive to boys for climbing, yet the information is not predicated upon the theory of an allurement nuisance. and appellant's argument on that subject need not be considered.

[illegible] the boy's possession in the [illegible] should not have intervened [illegible] negligence [illegible] permitting [illegible] or abandoned. [illegible] *Kennedy*.

support the charge that the boy received the electric current from the wire while in the tree, and in sustaining the demurrer. [illegible] the boy was no trespasser [illegible] cited by appellant relative to injuries received while "[illegible]" [illegible] property and not in poles. The rule as on a public street between the electric and [illegible]. [illegible] the boy [illegible] is right to play in the street, nor that it is unusual and unusual for a boy to climb a tree will not be [illegible] found. 'that is not unusual it is to be anticipated.' (*Kennedy* v. *Hessler*, 66 [illegible] 111.)

Nor is it a case like those cited by appellant, of deliberately wrongful, but for and taking hold of the wire. The difference from the decisions is that the movies of the [illegible] caused by the climbing brought children close to the boy in [illegible]

tact with a poorly insulated wire that ran either through or close to the branches, for in wet weather sparks had been seen to fall from the tree, thus indicating escape of electricity from the wire to its wet leaves and foliage.

2. It is urged that the verdict was excessive and the result of passion and prejudice. While the verdict was large the injuries were very great. The boy received multiple burns of a serious character on various parts of his body from the left foot and ankle to underneath the right arm, from which infection ensued, and a broken femur for which he underwent painful treatments during his six months confinement in a hospital. Six months after he left the hospital, during most of which time he was obliged to use a brace and crutches, his leg had to be dressed three times a day. The leg is shortened two inches, and the left femur permanently bowed in a marked manner. There is a large area of scarred tissue over the left thigh bone which protrudes against the skin so that the skin breaks at frequent intervals requiring plaintiff even at the time of the trial, six years after the accident, to remain in bed for treatment. Fully 65 to 75 per cent of the use of that leg is permanently lost. Without undertaking a more detailed description of his injuries that are severe, permanent and destined to inflict him with future pain and suffering and to impair his earning capacity, we cannot say, considering the present depreciated value of money and the limitations on the boy's opportunities for gaining a livelihood in the future, that the verdict is so excessive that a remittitur should be required. While we recognize our duty to scrutinize the record in a case of this nature where the verdict is claimed to be excessive, and it may be larger than we would have allowed, still we cannot say it is so excessive as to justify our interference with the jury's conclusion, or that they were influenced by passion or prejudice in reaching it.

permanent

As said in Lanyon v. Lanquist & Illsley Co., 157 Ill. App., 316, a personal injury case where the verdict was for $35,000 and claimed to be excessive, the amount of damages should be left largely to the sound judgment of the jury under proper instructions, and there are no hard and fast rules for measuring the amount, and the judgment of the reviewing court on such questions will not be substituted for that of the jury, unless it appears from the evidence that the amount assessed "is the result of passion or prejudice and not of calm and dispassionate reflection, or is so grossly excessive as to be inconsistent with reason and shocks one's sense of justice." We cannot say that the verdict is subject to any of these objections.

3. The alleged error in overruling a motion for a new trial is argued mainly on the ground of the absence of a material witness, a boy who was with plaintiff at the time of his injury, whose affidavit in support of the motion set forth that plaintiff was climbing the metal pole and not the tree.

The affidavits in support of the motion do now show due diligence prior to the trial to procure his attendance or to take his deposition. Defendant apparently had timely notice of the call of the case for trial, and time to ascertain the whereabouts of the boy, and whether his attendance could be procured or testimony had. The case went to trial on a Monday morning and while defendant's counsel then spoke of the absence of the expected witness he did not ask for any delay or continuance on that account. During a delay or interval of a couple of hours after plaintiff's case was put in defendant began inquiry and learned that the expected witness was enlisted in the United States Navy and stationed at Great Lakes, Illinois, but even then without asking for further delay or presenting any affidavit setting forth inability to procure his attendance at the trial

As said in Lawson v. Lumbert & Fisher Co., 157 Ill. App. 516, a personal injury case where the verdict was for $36,000 and claimed to be excessive, the amount of damages should be left largely to the sound judgment of the jury under proper instructions, and there are no hard and fast rules for measuring the amount, and the judgment of the reviewing court on such questions will not be substituted for that of the jury, unless it appears from the evidence that the amount assessed "is the result of passion or prejudice and not of calm and dispassionate reflection, or is so grossly excessive as to be inconsistent with reason and shocks one's sense of justice." We cannot say that the verdict is subject to any of these objections.

The alleged error in overruling a motion for a new trial is argued mainly on the ground of the absence of a material witness, a boy who was with plaintiff at the time of his injury, whose affidavit in support of the motion set forth that plaintiff was climbing the metal pole and not the tree.

The affidavits in support of the motion do not show due diligence prior to the trial to procure his attendance or to take his deposition. Defendant apparently had timely notice of the call of the case for trial, and time to ascertain the whereabouts of the boy, and whether his attendance could be procured or testimony had. The case went to trial on a Monday morning and while defendant's counsel then spoke of the absence of the expected witness he did not ask for any delay or continuance on that account. During a delay or interval of a couple of hours after plaintiff's case was put in defendant began inquiry and learned that the expected witness was enlisted in the United States Navy and stationed at Great Lakes, Illinois, but even then without asking for further delay or presenting any affidavit setting forth inability to procure his attendance at the trial

or the exercise of due diligence in the matter, defendant's counsel announced his intention "to stand on the record." In this state of the case we fail to see any error on which appellant can successfully stand. Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

295 - 26067

222 I.A. 630

REUBEN FISHER,
Appellee,

vs.

A. A. HORWITZ,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for possession in a forcible detainer action.

Under the lease the rent of $45 was due on the first of each month, and the lessee waived all right of notice or demand under the statute, and agreed to suit for possession without such notice or demand. Defendant gave a check to that amount the night of November 1, 1919, for the month of November. His balance in the bank was less than the amount of the check on that date and also when it was presented for payment on the 12th of the month. Having received notice that the check was not honored, plaintiff, without giving notice thereof or demand for possession, began this suit.

The check, lease and statement of defendant's bank account were received in evidence. Defendant offered no evidence except his custom to pay the rent by check, and proved that at some intervening day between November 1st and November 13th his credit in the bank was sufficient to meet the check. He also tendered the rent during the trial which, of course, was unavailing.

It does not appear that previous checks were received as payment except conditionally, and defendant having suffered no loss from plaintiff's delay to present the check in question can invoke no defense on the ground that the check might have

[illegible]

[illegible] FIRMIN,
Appellee,

vs.

A. A. MOSKITZ,
Appellant.

APPEAL FROM
[illegible]
OF COLORADO.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This appeal in form is judgment for possession in a forcible detainer action.

Under the lease the rent of $45 was due on the first of each month, and the lessee waived all right of notice or demand under the statute, and agreed to suit for possession without such notice or demand. Defendant gave a check in that amount the night of November 1, 1918, for the month of November. The balance in the bank a-a less than the amount of the check on that date and also when it was presented for payment on the 15th of the month. Having received notice that the check was not honored, plaintiff without giving notice thereof or demand for possession, began this suit.

The check, lease and admissions of defendant's bank account were received in evidence. Defendant offered no evidence except his motion to pay the rent by check, and proved that it was intervening day between November 1st and November 15th his credit in the bank was sufficient to meet the check. He also tendered the rent during the trial which, of course, was unavailing.

It does not appear that previous checks were received as payment except constructively, and defendant having suffered no loss from plaintiff's delay to present the check in awaiting [illegible]

been honored if presented at an intervening date.

The contention that a declaration of forfeiture and the notice and demand required by statute could not be dispensed with by express waiver thereof in the lease has been otherwise decided. (Aspen v. Kinchliffe, 131 Ill. 468; Palinski v. Brand, 76 Ill. App. 404; Kenyon v. Manley, 135 id. 615; Sherman House v. Cirkle, 136 id. 381; McKinney v. Mulvey Mfg. Co., 157 id. 339.) The cases relied on by appellant may be readily distinguished from those cited and the instant case because of different provisions in the leases, which we need not discuss. The instant case is practically like the case last cited. The judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

been ignored if presented in an interpleading case.

The contention that a declaration of forfeiture and the notice and demand required by statute could not be dispensed with by express waiver thereof in the lease has been otherwise negative. Jones v. Kimmelmann, 141 III. App. 1; Williams v. Jones, 76 III. App. 404; Kenyon v. Manley, 1 N.Y. 16, 313; Sherman Avenue v. Steele, 139 Ia. 341; Tallmage v. Tobin, 1 Ia. 107 Ia. 229.) The cases relied on by appellant may be readily distinguished from those cited and the instant case because of different provisions in the leases, which we need not discuss. The instant case is practically like the case last cited. The judgment will be affirmed.

Bradley, P. J., and Barrett, J., concur.

311 - 26083

FRANK SECKA,
Appellee,

vs.

CHICAGO & WEST TOWNS RAILWAY COMPANY, a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

222 I.A. 630

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $5,000 entered on a verdict of guilty in a personal injury action brought by said Secka against appellant company.

Appellant operated an electric railway west of Chicago into the Village of Lyons on its right of way near Ogden avenue, on which appellee became a passenger. The amended declaration so alleged and charged that defendant negligently caused and permitted the car to suddenly start forward without notice or warning and without letting him safely and properly board and get into it while with the exercise of due care he was standing on the foot-step leading to its platform attempting to safely board and get into it, and as a direct result that he was thrown, pushed and knocked against one of the poles supporting the trolley wires, whereby he was knocked upon the ground and injured.

The car was going easterly on its right of way on the south side of said Ogden avenue. A street, designated on different plats as "Mueller" and "Miller", ran into Ogden avenue from the north but not across it. If extended, it would cross the latter and defendant's right of way at a point where there was both its main track and a switch track south of it about 150 feet long on which stood two cars to receive passengers hastening to them on account of rain and darkness. The platform soon became crowded.

Plaintiff and a companion got on the lower step of the rear car, and stood there, each holding on to an upright pole in the entrance. They contended that by reason of the crowd on the platform they were unable to get onto it, and that there was still room in the car for passengers. While they were so standing the car started and after going about 380 feet (which took, as testified to, about 9 or 10 seconds) their bodies were brought into contact with one of said electric poles whereby they were knocked off and injured. This pole was at a curve in the track and leaned towards the track. It was testified to be from 6 to 15 inches from the side of the passing car. The steps were narrow and set into the platform, the lower one being a little over 2 feet long and projecting slightly beyond the outside line of the car.

The declaration alleges that when the car "was at, to-wit, a certain point upon said right of way, near and opposite to where a certain other public highway runs into and intersects said Ogden avenue from the north, known as, to-wit, 'Mueller' Street," etc., plaintiff attempted to board it "at said place." It is urged that as Mueller street does not "intersect" Ogden avenue, but merely runs into it, and as the evidence shows that where the car stopped and plaintiff attempted to board it was some 25 feet or more east of what would be the east line of Mueller street projected across Ogden avenue, there was a fatal variance between the allegations and proofs. But in this sort of an action the *locus in quo* need not be stated with such particularity as was done. (*C. C. Ry. Co.* v. *McMann*, 206 Ill., 108, 117; *Carlin* v. *City of Chicago*, 262 Ill., 554, 566.) It would have been sufficient had the place been designated, as appears in other parts of the declaration, as on defendant's right of way at or near Ogden avenue in said Village without averring its

Plaintiff and a companion got on the lower step of the rear car, and stood there, each holding on to an upright pole in the entrance. They contended that by reason of the crowd on the platform they were unable to get onto it, and that there was still room in the car for passengers. While they were so standing the car started and after going about 200 feet (which both, as testified to, about 5 or 10 seconds) their bodies were brought into contact with one of said electric poles whereby they were knocked off and injured. This pole was on a curve in the track and lower towards the track. It was testified to be from 6 to 10 inches from the side of the passing car. The steps were narrow and set into the platform, the lower one being a little over 2 feet long and projecting slightly beyond the outside line of the car.

The defendant alleges that about the car "was at, to-wit, a certain point upon said right of way, that the opposite is true; a certain other plaintiff [illegible] and [illegible] said Tyler avenue from the north, [illegible] to-wit, "Westbrook Street," etc., plaintiff attempted to board it "at said place." It is stated that in Westlake street there was "Intersection" Tyler avenue, but merely runs into it, and on the evidence shows that where the car stopped and plaintiff attempted to board it was some 30 feet or more east of what would be the east line of Westlake street projected across Tyler avenue, there was a total variance between the allegations and proofs. But in this case of no petition the James in rem need not be pleaded with such precisely as was done. (C. C. Ry. Co. v. Conner, 39 Ill., 167, 169. Coughlin v. City of Chicago, 38 Ill., 465, 467.) It would have been sufficient had the place been substantially as alleged in other parts of the pleadings, as is plaintiff's right of way

[illegible]

relation to Mueller street. Besides, the variance is not a substantial one as, disregarding what may be deemed surplusage, the starting point was alleged to be "near or where Mueller Street runs into Ogden Avenue," and the proof conforms to that allegation.

It is urged that the charge of negligence is confined to the manner, time and act of starting the car, that there was no proof of a "sudden" start, and that the proof is variant in showing that the accident did not take place at the time, or as a direct result of starting the car, but, on the contrary, after it had run a distance of 150 feet from the starting point, and that as negligence is not predicated on a negligent placing of the pole, but solely upon starting the car "suddenly" and "without notice," etc., the charge is not sustained by the proof.

While we recognize that on technical grounds there is room for discussion on this point, yet as the evidence tended to show that plaintiff stepped on the lower step of the car while it was standing at a regular stopping place for receiving passengers, when it was dark and raining, with the apparent intention of boarding it as a passenger, and on account of the crowded platform stood there waiting for those on the platform to make room for him to get thereon, and that while he was thus waiting the conductor, knowing or charged with knowledge of these conditions and of the location of the trolley poles and that the one in question would be quickly reached, without warning plaintiff thereof or giving him an opportunity to get safely aboard or better his position, signalled or permitted the car to start, we are not prepared to say that the injury was not the proximate result of starting the car without giving plaintiff such an opportunity. While it may be said that a direct cause of the injury was the proximity of the pole to the car or its track,

relation to Smallor street. Besides, the variance is not a substantial one as, disregarding what may be deemed surplusage, the starting point was alleged to be "near or where Smallor Street runs into Ogden Avenue," and the proof conforms to that allegation.

It is urged that the charge of negligence is confined to the manner, time and not of starting the car, that there was no proof of a "sudden" start, and that the proof is variant in showing that the accident did not take place at the time, or as a direct result, of starting the car, but, on the contrary, after it had run a distance of 300 feet from the starting point, and that an negligence is not predicated on a negligent placing of the pole, but solely upon starting the car "suddenly" and "without notice," etc., the charge is not sustained by the proof.

While we recognize that on technical grounds there is room for discussion on this point, yet as the evidence tended to show that plaintiff stepped on the lower step of the car while it was standing at a regular stopping place for passengers, when it was dark and raining, with the apparent intention of boarding it as a passenger, and on account of the crowded platform stood there waiting for those on the platform to walk ahead for him to get thereon, and that while he was thus waiting the conductor, knowing or charged with knowledge of these conditions and of the location of the trolley pole and that the car in question could be quickly reached, without causing plaintiff thereof or giving him an opportunity to get safely aboard or better his position, signalled or permitted the car to start, we are not prepared to say that the injury was not the proximate result of starting the car without giving plaintiff such an opportunity. While it may be said that a closer case of the injury was the proximity of the pole to the car or its inner

yet recovery would not be precluded upon the negligence charged of so starting the car if, as the evidence tends to show, there was a concurrence and combination of a negligent maintenance of the pole and negligence in starting the car under such circumstances. Where two or more negligent acts concur and combine to produce an injury, the negligent act alleged in the declaration need not be the sole cause. (Brunnworth v. Berens Coal Co., 260 Ill., 202, 214.)

As to the contention that there was no proof that the car started "suddenly," if under such circumstances it was negligence to start the car without warning of the danger so imminent and giving plaintiff an opportunity to get safely aboard, and the accident was a direct result of such negligence, and plaintiff might reasonably expect that such opportunity would be given him, we think it is not an inapt description to say that the car was, under such circumstances, started "suddenly". Indeed, the word "suddenly" would seem to be surplusage in view of the fact that the accident was bound to happen under the circumstances, whatever the manner of starting. Hence we do not think there was a material variance or an insufficiency of proof, or that it was error to receive evidence of the failure to give warning of such danger.

Some complaint is made as to the proof received as to the speed of the car. Even if such proof was incompetent we fail to see how, in view of the proximity of the starting place to the point of danger, such proof could have any special influence in the determination of the issues.

Appellant discusses some features of the case as to which the evidence is somewhat conflicting, such as whether the car was as crowded as plaintiff claimed, whether plaintiff was on the step before it started, or was exercising ordinary care

yet recovery would not be precluded upon the negligence charged of so starting the car if, as the evidence tends to show, there was a concurrence and combination of a negligent maintenance of the pole and negligence in starting the car under such circumstances. There too or more negligent acts concur and combine to produce an injury, the negligent act alleged in the declaration need not be the sole cause. (Kennedyville v. Farmers Trust Co., 247 Ill., 392, 394.)

As to the contention that there was no proof that the car started "suddenly," if under such circumstances it was negligence to start the car without warning of the danger an instant and giving plaintiff an opportunity to get safely aboard, and the accident was a direct result of such negligence, and plaintiff might reasonably expect that such opportunity would be given him, we think it is not an issue determinable to say that the car was under such circumstances, started "suddenly". Indeed, the word "suddenly" would seem to be surplusage in view of the fact that the accident was found to happen under the circumstances, shown over the manner of starting. Hence we do not think there was a material variance or an insufficiency of proof, or that it was error to receive evidence of the failure to give warning of such danger.

Some complaint is made as to the proof received as to the speed of the car. Even if such proof was incompetent we fail to see how, in view of the proximity of the starting place to the point of danger, such proof could have any special influence in the determination of the issues.

Appellant discusses some features of the case as to which the evidence is somewhat conflicting, but to notice the contention as to PLAINTIFF'S CLAIM, WHETHER PLAINTIFF WAS on the step before it started, or was exercising ordinary care

for his own safety while in such position, and whether he was intoxicated and his condition contributed to the injury, all properly questions for the jury to decide according to the preponderance of the evidence; and while it is not directly urged here that the verdict was manifestly against the preponderance of the evidence, we would not be inclined so to hold.

Defendant demurred to the declaration but pleaded over after the overruling of the demurrer, and it is urged here that the declaration is insufficient in its allegations of due care by plaintiff and of the facts to show that the injury was the direct consequence of the alleged negligence. It has been held that allegations of such character are cured by verdict. As to due care, see B. & O. Southwestern Ry. Co. v. Then, 159 Ill., 535; I. C. & R. Co. v. Warriner, 229 id., 91, 97; Brunhild v. Union Traction Co., 239 id., 621; and as to proximate cause, see Ill. Terra Cotta Lumber Co. v. Hanley, 214 id., 243. And where, as here, the defects are not so substantial that the declaration will not sustain the judgment after verdict, then by pleading over the alleged defects are waived and error in overruling the demurrer cannot be assigned. See Mason & Trent Bros. v. Neal, 204 Ill. App., 538, and cases cited.

It is also urged that the court erred in sustaining the demurrer to the plea of the Statute of Limitations. At the close of the evidence, on account of an alleged variance, the declaration was amended. But without entering into an analysis of the different particulars in which changes from the original declaration were made describing more accurately defendant's right of way with respect to Ogden avenue and said Mueller or Miller street and the location of the trolley poles, and the cause of the accident, we think the amended declaration did not state a new cause of action. The gist of the negligence charged was the same, viz.,

for his own safety while in such position, and whether he was intoxicated and his condition contributed to the injury, all properly questions for the jury to decide concerning in the preponderance of the evidence; and while it is not discretionary upon the verdict was manifestly against the preponderance of the evidence, we would not be inclined to do this.

Defendant demurred to the complaint but pleaded over after the overruling of the demurrer, and it is urged here that the complaint is insufficient in its allegations of the cause of plaintiff and of the facts to show that the injury was the direct consequence of the alleged negligence. It has been held that allegations of such character are based by pleadings. As to this case, see B. & T. Engineering Co. Ia. v. Thom, 169 Ill. 449; A. T. & S. F. R. Co. v. Lattner, 177 Ill. 71, 77. Kendall v. Iron Exchange Co., 239 Id. 492; and as to proximate cause, see Ill. Terra Cotta Lumber Co. v. Hanley, 244 Id. 246. And more, as here, the defects are not so substantial that the defendant will not sustain the judgment after verdict. Then by pleading over the alleged defects are waived and error in overruling the demurrer cannot be assigned. See Burns & Ingel Bldg. v. Ball, 224 Ill. App., 238, and cases cited.

It is also urged that the court erred in sustaining the demurrer to the plea of the statute of limitations. At the close of the evidence, on account of no alleged warranty, the defendant was nonsuited. The official reporter has an analysis of the different pleadings in which changes from the original declarations were made concerning more accurately defendant's right of way with respect to lights around and said bumper or bifler street and the locations of the traffic poles, and the cause of the accident, so long the amended declaration did not state a new cause of

starting the car without warning plaintiff of an imminent danger or giving him an opportunity to get safely aboard, as a result of which he received an injury. Similar points were adversely decided in the McMeen case, supra, and I. C. R. R. Co. v. Devine, 262 Ill., 484, 486; South Chicago City Ry. Co. v. Kinnare, 216 id., 451; Swift Co. v. Gaylord, 219 id., 330, 334, where it was held the amended pleadings did not state a new cause of action.

Error is urged in the admission of certain X-ray plates as not properly authenticated, and of their exhibition to the jury, and in receiving the testimony of Dr. Nathaniel H. Adams with respect thereto. We find no reversible error in these contentions. The evidence showed that plaintiff was taken by Dr. Adams to an X-ray laboratory where X-ray photographs were taken of plaintiff's chest by an operator in said laboratory. The doctor was present when they were taken and during the time they were developed. His connection therewith was in placing plaintiff in the position he wanted him, observing the operation of taking the pictures and their development immediately afterwards, and seeing that the several plates were identified by name plate and number and by his own writing of plaintiff's name thereon. After he testified to this manner of their identification and that he had some practical knowledge and experience in taking X-ray pictures, he was asked if the plates represented a substantial likeness to the bones of plaintiff's body at the time the plates were taken. Objection was made to the question and an opportunity given for cross examination on the subject. After such cross examination the court overruled the objection, but no answer to the question was given. The plates were then, over objection, received in evidence and the doctor was permitted to point out and explain those parts thereof that could be made intelligible to the jury, mainly where they showed certain ribs

starting the new without causing plaintiff of an imminent danger or giving him an opportunity to get safely aboard, or a reasonable time to prevent an injury. Under these circumstances decided in the Indiana case, Lewis, and E. H. R. R. Co. v. Lawing, 24 Ind. App. 484, 486; Louisville Ind. R. R. Co. v. Clements, 104 Ind. 492; Wells Co. v. Hughes, 105 Ind. 234, 236, where it was held the mounted plaintiff did not state a key cause of action.

Error is urged in the admission of certain X-ray plates as not properly authenticated, and of their exhibition to the jury, and in receiving the testimony of Dr. Thomas E. Adams also impeached herein. In this as previously stated in these contentions. The evidence showed that plaintiff was taken by Dr. Adams to an X-ray laboratory where X-ray photographs were taken of plaintiff's chest by an operator in said laboratory. The doctor was present when they were taken and during the time they were developed. His connection therewith was in planning physically as the problem in medical his, directing the operation of making the pictures and their accompanied medical, affirmative, and proving that the several plates were identified by name plate and number and by his own writing of plaintiff's name thereon. After he testified to this manner of their identification and that he had some professional knowledge and experience in taking X-ray pictures, he was asked if the plates represented a substantial likeness to the bones of plaintiff's body at the time the plates were taken. Objection was made to the question and an opportunity given for cross examination on the subject. After such cross examination the court overruled the objection, but no answer to the question was given. The plates were then, over objection, received in evidence and the doctor was permitted to point out and explain some parts thereof that could be seen

were fractured or out of alignment. There is no contention that the parts of the plates thus pointed out could not readily be seen and understood by a layman. Testifying as to a part which was not pointed out to the jury the doctor expressed his opinion that it showed a thickening of the pleura by reason of pleurisy that was shown to have followed the injuries. The doctor was then asked whether plaintiff's condition, as he had described it from his physical examination and also from the X-ray plates, was a temporary or permanent condition. Over objection he answered "a permanent condition." All that was thus testified to from the plates had already been testified to as appearing from physical examinations made both by Dr. Adams and a physician who had plaintiff under his care after the accident. The defense offered no evidence tending to question the nature and extent of the injuries thus testified to. Hence, if there was noncompliance with any technical requirements in receiving the plates in evidence it is difficult to see how defendant was injured thereby. But we think they were sufficiently identified and that the testimony with regard thereto was competent, especially in the absence of any objection to their admission in evidence on the ground that they were not accurately taken.

As to the shadow box whereby the matters pointed out on the plates were more clearly elucidated, we see no reasonable objection to its use either in explaining the plates to the jury or in commenting on them in the course of counsel's address. We fail to see that any reasonable distinction can be made between them and any other photograph or exhibit which the jury is permitted to inspect during the course of its presentation or argument thereon.

Nor do we find reversible error in giving an instruction merely because it referred to the declaration, or in the refusal to give one telling the jury to find the defendant not guilty if they believed from the evidence that the accident in question was due in any degree to the fact that the plaintiff had drank intoxicating liquor prior to boarding the car. This and another refused instruction were properly refused, as they required the court to tell the jury what constituted ordinary care by plaintiff for his own safety under the circumstances - a question of fact for the jury. Such an instruction is generally disapproved. (C. B. & Q. R. R. Co. v. Pollock, 195 Ill., 163.)

It is also urged that the verdict is excessive and that it was error for counsel for plaintiff to suggest to the jury in his argument the amount of damages he thought plaintiff should recover. The latter contention was adversely decided in Graham v. Mattoon City Ry. Co., 234 Ill., 483.

Without extending this opinion by stating the extent of plaintiff's injuries it is enough to say that from the evidence in regard thereto we are unable to say that the verdict was excessive. We feel it our duty to affirm the judgment.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

Nor do we find reversible error in giving an instruction merely because it referred to the declaration, or in the refusal to give one telling the jury to find the defendant not guilty if they believed from the evidence that the accident in question was due in any degree to the fact that the plaintiff had drunk intoxicating liquor prior to boarding the car. This and another requested instruction were properly refused, as they permitted the court to tell the jury what constituted negligency and by plaintiff for his own safety under the circumstances - a question of fact for the jury. Such an instruction is generally disapproved. (C. R. & P. R. R. Co. v. Pallock, 199 Ill., 188.)

It is also urged that the verdict is excessive and that it was error for counsel for plaintiff to suggest to the jury in his argument the amount of damages he thought plaintiff should recover. The latter contention was strongly denied in Graham v. Nation City Ry. Co., 224 Ill., 489.

Without extending this opinion by stating the extent of plaintiff's injuries it is enough to say that from the evidence in regard thereto we are unable to say that the verdict was excessive. We feel it our duty to affirm the judgment.

AFFIRMED.

Pillsbury, P. J., and Morrill, J., concur.

319 - 26091

THORNTON-CLANEY LUMBER COMPANY, (Complainant), Appellee,	
vs.	APPEAL FROM
A. E. FROST et al., (Defendants), Appellees.	SUPERIOR COURT, COOK COUNTY.
ROSEHILL CEMETERY COMPANY, Appellant,	
vs.	
W. H. DOW MANUFACTURING COMPANY, a corporation, et al., Appellees.	

222 I.A. 630

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal by Rosehill Cemetery Company from a decree entered in a mechanic's lien suit awarding in favor of eight claimants liens on premises known as "The House that Jack Built," and giving priority to such liens over the lien of a trust deed securing notes owned by said appellant.

Suit was instituted by Thornton-Clancy Lumber Company, a sub-contractor, to enforce its lien, and the other claimants came in by answers and petitions under the statute. The findings and recommendations of the master were, after the usual proceedings, confirmed by the chancellor.

Most of said claimants were sub-contractors, and the main contentions of appellant are that the notices purported to have been served under the statute were insufficient, and the claims were not enforced within the statutory period. The dates of the contracts, deeds, deliveries and assertion of claims hereinafter referred to were all in 1914, except when otherwise stated, and are deemed material to the controversies.

The building in question was an automobile inn and clubhouse. For some time prior to April 1st of said year the premises on which it was erected stood in the names of John

THORNTON-CLARKE LUMBER COMPANY, (formerly),
Appellee,

vs.

A. E. HOST et al.,
(Defendants),
Appellees.

ANNUAL TERM

MORRISON COUNTY,

COURT COURTS.

SMITH-... COMPANY,
Appellant,

vs.

E. . . HOW MADE CONTRACTING COMPANY, a corporation, et al.,
Appellees.

292 I.A. 680

Mr. Justice ... delivered the opinion of the court.

This is an appeal by Donehill Cemetery Company from a decree entered in a mechanic's lien suit awarding in favor of eight claimants liens on premises known as "The Great Ten Tech Mills," and giving priority to such liens over the lien of a trust deed securing notes owned by said appellant.

Suit was instituted by Thornton-Clarke Lumber Company, a sub-contractor, to enforce its lien, and the other claimants came in by answers and petitions under the statute. The findings and recommendations of the master were, after the usual proceedings, confirmed by the chancellor.

Most of said claimants were sub-contractors, and the main contentions of appellant are that the matters purported to have been served under the statute were insufficient, and the claims were not enforced within the statutory period. The dates of the contracts, deeds, deliveries and assertion of claims were further referred to were all in 1924, except when otherwise stated, and are deemed material to the controversies.

The building in question was an automobile tire and giftshop. For some time prior to April 1st of said year the

Allison, Sr., and members of his family. The findings were that for several months prior to April 15th, Harry G. Muerzinger and Albert M. Frost held an option for the purchase thereof, that on February 12th, they entered into a written contract, in which they are described as the agents and promoters of a corporation to be organized and known as "The House that Jack Built," with one Vitzthum as architect, in which he agreed to prepare the drawings and specifications and procure from contractors, estimates and bids for the construction of said building; that about March 16th, they entered into a written contract with F. L. Muerzinger to provide all the material and perform and supervise all the work for such materials as were subsequently furnished and became the subject of said sub-contractors' liens; that by deed dated May 19th, and recorded June 4th, the Allisons conveyed the fee of said premises to said Frost and Harry G. Muerzinger; that said grantees executed a trust deed therefor April 15th, recorded May 28th, securing the notes held by appellant Rosehill Cemetery Company and a second trust deed August 28th, securing notes held by one Bippus; that on June 20th they conveyed the premises to one Hill, as trustee, who reconveyed the same to them July 28th, and on August 4th they conveyed the premises to The House that Jack Built, a corporation.

We shall refer to the findings and contentions made with respect to the claims of the several sub-contractors in the order in which appellant questions the validity of such claims.

1. CLAIM OF W. H. DOW COMPANY.

Pursuant to the contract of this claimant with said contractor on April 18th it furnished certain trim and mill work in accordance with said architect's plans and specifications for

Allison, Jr., and members of his family. The findings were that Jay Arvyl Moore failed to equal $50, Harry E. Darnell and Albert E. Frost paid in excess for the portions "Overall," that on February 10th, they entered into a written contract, in which they are described as the agents and promoters of a corporation to be organized and known as "The House that Jack Built," with one Vitrohum as architect, in which he agreed to prepare the drawings and specifications and procure from contractors, estimates and bids for the construction of said building; that about March 10th, they entered into a written contract with F. L. Warringer to provide all the material and workmen and supervise all the work for such materials as were subsequently furnished and because the subject of said sub-contractors liens; that by deed dated May 17th, and recorded June 6th, the plaintiffs conveyed the fee of said premises to said Frost and Harry E. Warringer; that said grantees executed a trust deed to Harry E. Darnell, trustee, to secure payment of the notes held by the plaintiffs; that on June 20th they conveyed the premises to the trustee, who reconveyed the same to them July 28th, and on August 4th they conveyed the premises to the House that Jack Built, a corporation.

We shall refer to the findings and conclusions made with respect to the claims of the several sub-contractors in the order in which appellant questions the validity of such claims.

1. CLAIM OF A. E. DEL VECCHIO.

Pursuant to the contract of this claimant with said contractor on April 15th it furnished certain trim and will work in accordance with said architect's plans and specifications for

a specific sum, payment of 85 per cent of the estimated value of material delivered "to be paid as the work progressed," and the balance within 30 days from the date of completion. After deliveries were commenced, and before final delivery of material said contract called for, namely, on May 19th, extra and additional material of the same character was ordered by the contractor, either in writing or verbally. The last delivery of material embraced in the original contract was made July 29th, and that under the extra orders on some day of August not specified, which, construing the evidence most strongly against the claimant, will be regarded as August 1st. The notice notified them of claimant's employment by said contractor "to furnish original and extra material and labor for interior and exterior trim, mill work, etc.," under their said contract, and that there was due claimant June 29th, 1914, therefore the sum of $611.50. A statement of claim to the same effect as to the time of completion and final delivery was also filed in the office of the clerk of the Circuit Court under sec. 25 of the Mechanics' Lien Act, because of alleged inability to find said Frost and Harry C. Muerzinger in Cook County, on whom to make personal service of said notice. Claimant's answer, in the nature of an intervening petition, was filed in this case November 21, 1914. It was amended September 29, 1916, stating that the amount alaimed aforesaid was due on August 5, 1914, for deliveries made between April 18th and August 5th, 1914, made under the original contract and the orders for additional material.

Under this state of facts appellant contends that the notice was insufficient in form and was not served on the right party, and that the suit to enforce the claim was not brought in time.

The notice is substantially in the form held sufficient

a specific sum, payment of 85 per cent of the estimated value of material delivered "to be paid as the work progressed," and the balance within 30 days from the date of completion. After deliveries were commenced, and before final delivery of material said contract called for, namely, on May 19th, extra and additional material of the same character was ordered by the contractor, either in writing or verbally. The last delivery of material embraced in the original contract was made July 30th, and that under the extra orders on some day of August not specified, which, considering the evidence most strongly against the plaintiff, will be regarded as August 1st. The notice notified them of claimant's employment by said contractor "to furnish original and extra material and labor for interior and exterior trim, mill work, etc., under their said contract, and that there was due claimant June 30th, 1914, therefore the sum of $611.50. A statement of claim to the same effect as to the time of completion and final delivery was also filed in the office of the clerk of the Circuit Court under sec. 35 of the Mechanics' Lien Act, because of alleged inability to find said Trost and Harry S. Swartinger in Cook County, on whom to make personal service of said notice. Claimant's answer, in the nature of an intervening petition, was filed in this case November 21, 1914. It was amended September 29, 1916, stating that the amount claimed aforesaid was due on August 5, 1914, for deliveries made between April 10th and August 5th, 1914, made under the original contract and the orders for additional material.

Under this state of facts appellant contends that the notice was insufficient in form and was not served on the right party, and that the suit to enforce the claim was not brought in time.

The notice is substantially in the form held sufficient

in the case of I. Lurya Lumber Co. v. Bernstein, 168 Ill. App., 85. It was held in Beck Coal Co. v. Peterson Mfg. Co., 237 Ill., 250, that the statute does not require the notice to state that the material was delivered or when payment therefor would become due. The statement, therefore, as to the time of final delivery was unnecessary and may be rejected as surplusage, and will not be regarded as vitiating said notice or the statement filed. (Culver v. Schroth, 153 Ill., 437; Interstate Building Ass'n. v. Ayers, 177 Ill., 9.) The notice, therefore, cannot be regarded as insufficient because of its form.

The amendment of the answer was properly allowed, we think, because of the claim of alleged mistake as to the time of the last delivery, and so as to make the petition conform to the proof. The amendment was not the statement of a new cause of action as in the case of North Shore Sash & Door Co. v. Hecht, 295 Ill., 515, referred to by appellant. There the amendment was an attempt to supply at too late a date an averment lacking in the original bill and essential to sustain the cause of action.

Under section 33 of the Mechanics' Lien Act the petition must be filed within four months after the time that final payment is due the sub-contractor. The original contract with the Dow Company provided that the balance should be due thirty days after final delivery, which was shown to be July 29, instead of June 29, as stated in said notice. Whether we regard payment for the extras due at the time of the final delivery July 29th or August 1st, or thirty days thereafter, the petition having been filed November 21st was within the statutory period, computing the four months from even the earliest date, and was sufficient to cover payments due under the original contract and additional orders, and, whether they be deemed as one contract or several, the liens acquired thereunder antedated that of appellant.

It is urged that the notice was not served on the

in the case of L. Larsen Lumber Co. v. Swinnerton, 168 III. App., 85. It was held in Cook Coal Co. v. Patterson Mfg. Co., 229 Ill., 250, that the statute does not require the notice to show that the material was delivered or when payment therefor would become due. The statement, therefore, as to the time of final delivery was unnecessary and may be rejected as surplusage, and will not be regarded as vitiating said notice or the statement filed. (Holmes v. Adkins, 144 Ill., 477; Southern Illinois Brick Co. v. Lloyd, 177 Ill., 9.) The notice, therefore, cannot be regarded as insufficient because of its form.

The amendment of the answer was properly allowed, we think, because of the claim of alleged mistake as to the time of the last delivery, and so as to make the pleadings conform to the proof. The amendment was not the statement of a new cause of action as in the case of North Shore Lumber & Door Co. v. Woods, 98 Ill., 519, referred to by appellant. There the amendment was an attempt to supply as the basis a note as evidence including in the original bill and essential to sustain the cause of action.

Under section 22 of the Mechanics' Lien Act the petition must be filed within four months after the time that final payment is due the sub-contractor. The original contract with the Dow Company provided that the balance should be due thirty days after final delivery, which was shown to be July 22, instead of June 22, as stated in said notice. Whether or regard payments for the extra due at the time of the final delivery July 22th or August 1st, or thirty days thereafter, the petition having been filed November 21st was within the statutory period, computing the four months from even the earliest date, and was sufficient to cover payments due under the original contract and additional extra, and, whether they be treated as one contract or several, the Lien acquired thereunder embraced that of appellant.

It is clear that the notice was not served on the

owner of the property or his agent or architect, as required by sec. 25 of said act. The notice was necessary. The facts are not such as bring it within the proviso of section 24 when such a notice "shall not be necessary." It was personally served on said architect, and if he was the architect of "the owner" there is no room for discussion. He was employed by Frost and Harry Wuerzinger, as aforesaid, and they in their contract purported to be acting for "The House that Jack Built," whose organization as a corporation was not completed until later. When said notice was given said Frost and Wuerzinger had acquired the legal title, but manifestly for said corporation, and said claimant's contract was being carried out under the plans and specifications of said architect. While our attention is not called to any express finding that said Vitzthum acted as the architect up to the time of the conveyance to said corporation, we think that is the implication from the master's report and the decree. Our attention is not called to any evidence to the contrary. It was held in Springer v. Kroeschell, 161 Ill., 358, that:

> "Where the equitable owner of land, who has paid an agreed price therefor, permits a building to be erected thereon, and suffers the legal title to remain in another until its completion, the holder of the legal title is, for all practical purposes pertaining to the construction of the building, the owner within the meaning of the Mechanics' Lien Law, and the equitable estate will be equally bound with the legal title to satisfy the liens of mechanics, or material men, growing out of the contracts made with him in the construction of the building."

Whether Frost and Wuerzinger, who authorized the contracts and took title to the premises while they were being carried out, be regarded as "owner," or The House that Jack Built, for whom they evidently held the legal title and made all the contracts, we think that the notice served on Vitzthum was on an agent of the "owner" in the sense in which the term is

owner of the property or his agent or architect, as required by sec. 28 of said act. Was notice was necessary. The facts are not such as bring it within the proviso of section 21 when such a notice "shall not be necessary." It was personally served on said architect, and if he was the architect of "the owner" there is no room for discussion. He was employed by Ryan and Harry Weringer, as aforesaid, and they in their contract warranted to be acting for "the Jones Club Hotel Built," whose organization as a corporation was not completed until later. When said notice was given said Ryan and Weringer had acquired the legal title, but manifestly for said corporation, and said claimant's contract was being carried out under the plans and specifications of said architect. While our attention is not called to any express finding that said Atkinson acted as the architect up to the time of the conveyance to said corporation, we think that is the implication from the master's report and the decree. Our attention is not called to any evidence to the contrary. It was held in Ingham v. Kronenwall, 141 Ill., 588, that:

> "Where the equitable owner of land, who has paid an agreed price therefor, permits a building to be erected thereon, and suffers the legal title to remain in another until its completion, the holder of the legal title is, for all practical purposes pertaining to the construction of the building, the owner within the meaning of the mechanics' lien law, and the equitable estate will be equally bound with the legal title to satisfy the lien of mechanics, or material men, growing out of the contracts made with him in the construction of the building."

Neither Ryan and Weringer, who authorized the conveyance and took title to the premises while they were being carried out, be regarded as "owner," or The Jones Club Hotel, for when they evidently held the legal title and made all the contracts, we think that the notice served on Atkinson was to an agent of the "owner" in the sense in which the term is

employed in the statute. Under sec. 1 of the Mechanics' Lien Act the lien extends to any interest the owner may have "at the time of making such contract, or may subsequently acquire therein." (See, also, Paulsen v. Manske, 126 Ill., 72.) Hence we do not agree with appellant's contentions and think the Dow Company's claim was properly allowed.

2. CLAIM OF NICHOLAS MELZER.

Melzer made a contract March 18th with the same contractor to do all the concrete and masonry work and supply the material therefor at a fixed price. Extra work and labor of that character were ordered and supplied at an agreed price. The contract was completed and the last work done June 17th. He filed a statement under section 25, alleging therein his diligent search and inquiry to ascertain where the owner, agent, etc., could be found and that he was unable to ascertain their whereabouts. The master found that the final work was completed June 18, and that the last payment was due July 18th. The terms of payment were the same as in the Dow Company contract, above considered, 85 per cent to be paid as the work progressed and 15 per cent thirty days after completion. The evidence indicates that it was considered as one entire contract, so that the time within which the four months would run was thirty days after June 18. The evidence tends to support the master's finding that the last delivery was made on or about that date. His claim was filed with the clerk of the Circuit Court August 13th, and his petition herein October 16th. Hence the petition was filed within four months after July 18th, when the last payment became due. Melzer made proof of his inability to ascertain the whereabouts of the owner or his agents, etc., tending to bring him within the provisions of section 25. While the proof was quite general, as contended by appellant, yet appellant did not

employed in the statute. Under sec. 1 of the Commission' lien act the lien extends to any interest the owner may have "in the line of building work concerned, or any interest in the premises." See, also, Phillips v. Phillips, 1st Ed., 774; Dunn v. Dunn, 1 Ch. 1, 1911. We do not agree with appellant's contentions and think the New Company's claim was properly allowed.

2. CLAIM OF ATTORNEY MALONE.

Malone made a contract dated 1st, with the same contractor to do all the concrete and masonry work and supply the material therefor at a fixed price. Extra work and labor of that character were ordered and supplied at an agreed price. The contract was completed and the last work done June 17th. He filed a mechanic's lien notice 30, claiming therein six different items and amounts to accrue when the work, labor, etc., could be found and that he was unable to ascertain their whereabouts. The master found that the final work was completed June 18, and that the last payment was due July 18th. The terms of payment were the same as in the Low Company contract, above considered, 85 per cent to be paid as the work progressed and 15 per cent thirty days after completion. The evidence indicates that it was considered as one entire contract, as that the time within which the four months would run was thirty days after June 18. The evidence tends to support the master's finding that the last delivery was made on or about that date. His claim was filed with the clerk of the Circuit Court August 17th, and his petition herein October 18th. Hence the petition was filed within four months after July 17th, when the last payment became due. Malone made proof of his inability to ascertain the whereabouts of the owner or his agents, etc., tending to bring him within the provisions of section 30. While the proof was quite general, as contended by appellant, yet appellant did not

attempt to impair the prima facie showing of compliance with the statute by any cross examination. We do not think the form of said statement was such as to invalidate the claim, and that the answer to enforce the same was filed in due time.

3. CLAIM OF THORNTON-CLANEY LUMBER COMPANY.

The contract of this claimant with said original contractor was made April 7th, for lumber and building material for use in the construction. The first delivery was April 7th, and the last June 11th. The contractor submitted a list of the lumber wanted and the claimant his price. On that estimate a sale was made, and subsequently other like material was ordered and supplied. On August 4th said claimant served said Frost and Muerzinger with a notice of entry into such contract stating the amount due thereon June 11th. It is urged that the notice does not sufficiently state what the contract was, which was seemingly partly written and partly oral. We think the notice conforms to the requirements of the statute, and that it is immaterial so far as the notice is concerned whether the contract was in writing or verbal or wholly one or the other. A lien may be predicated upon either. Hence we do not think the objections to this claim are tenable.

4. CLAIM OF FARWELL CORNICE COMPANY.

This claimant was a sub-contractor for the sheet and metal work under a contract entered into April 24th with the same contractor. It is claimed that neither the notice of the lien thereunder nor the filing of the intervening petition was in time. The notice, dated September 18th, was served on Frost and Muerzinger, and the petition was filed December 17th. The contract provided that the last 15 per cent of the contract price was to be paid thirty days after the completion of the work. There were extra orders, as in the other cases above

attempt to impair the prima facie showing of compliance with the statute by any cross examination. We do not think the form of said statement has such as to invalidate the claim, and that the manner to enforce the same was filed in due time.

3. CLAIM OF CONTRACTOR-CLAYEY LUMBER COMPANY.

The contract of this claimant with said original contractor was made April 7th, for lumber and building material for use in the construction. The first delivery was April 7th, and the last June 11th. The contractor submitted a list of the lumber wanted and the claimant his price. On that estimate a sale was made, and subsequently other like material was ordered and supplied. On August 4th said claimant served said Frost and Wartringer with a notice of entry into such contract stating the amount due thereon June 11th. It is urged that the notice does not sufficiently state the contract fact, which we assumingly partly written and partly oral. We think the notice conforms to the requirements of the statute, and that it is immaterial as far as the notice is concerned whether the contract was in writing or verbal or wholly one or the other. A lien may be predicated upon either. Hence we do not think the objections to this claim are tenable.

4. CLAIM OF WASHBURN-DONNICK COMPANY.

This claimant was a sub-contractor for the sheet and metal work under a contract which June 11th 1909 with the same contractor. It is claimed that neither the notice of the lien thereunder nor the filing of the intervening petition was in time. The notice, dated September 18th, was served on Frost and Wartringer, and the petition was filed December 17th. The contract providd that the last 15 per cent of the contract price was to be paid thirty days after the completion of the work. There were extra orders, as in the other cases above

referred to, and the work was completed July 20th. From the evidence we think the extras were properly deemed a part of the original contract, if that be material, and that the computation of the four months by the master as beginning thirty days after the last delivery was proper and, therefore, the petition was filed in due time. We find no substantial defect in the notice served, and in view of what has been previously said, that it was properly served on said Frost and Muerzinger.

5. CLAIM OF STEINMETZ ELECTRIC COMPANY.

This claimant was an original contractor and it is urged that its petition was not filed, as required by section 9 of said act, within two years after the completion of the contract or completion of the additional or extra work, etc. This contract was made with Harry Muerzinger and Frost, April 22nd. Final payment was to be made thirty days after completion of the work. Extra materials and work were furnished during the month of June. According to testimony to that effect, which was not disputed, the master found that the last work done under the contract, embracing the extras, was September 26th. The claim for the lien was filed October 6, 1914, and the intervening petition was filed September 25, 1916, and, therefore, within two years after the last work was done. We find no occasion to disturb the master's finding or the decree in sustaining the lien and regarding the original contract and the extras as practically one contract for which a lien may be asserted. We do not think the notice in so treating it was insufficient.

6. CLAIM OF N. J. CORBY COMPANY.

This is based on a contract made April 15th with the original contractor to furnish the labor and materials in installing the plumbing and drainage work. It provided for

referred to, and the work was completed July 20th. From the evidence we think the extras were properly deemed a part of the original contract, if that be material, and that the completion of the four months by the master is beginning thirty days after the last delivery was proper and, therefore, the petition was filed in time. We find no substantial defect in the notice served, and in view of what has been previously said, that is the strictly proper notice to sub-contractors.

4. Claim of contractor against owner.

This claimant was an original contractor and it is admitted that the petition was filed within the period allowed by law of such act, within two years after the completion of the contract or the completion of the additional or extra work, etc. This contract was fully completed and the final payment was to be made thirty days after completion of the work. Extra materials and work were furnished during the month of June. According to testimony to show effect, which was not disputed, the master found that the last work done under the contract, including the extras, was completed May. The lien was filed October 2, 1914, and the intervening petition was filed September 28, 1914, and intervening petition after the last work was done. We find no occasion to disturb the master's finding of the defense in withholding the lien and requiring the original contract and the extras be practically one contract for which a lien may be asserted. We do not think the notice in so treating it was insufficient.

5. Claim of R. J. Doyle company.

This is based on a contract made until 1914 with the original contractor to furnish the labor and materials in installing the plumbing and drainage work. It provided for

additional extra work and for alterations from the architect's plan. Final payment was to be made thirty days from the completion of the work including the extras. The work was completed July 20th, and sub-contractor's notice served September 17th on The House that Jack Built, and also upon Vitzthum and Frost personally. The intervening petition was filed December 18th. The objections urged against the claimant are that no notice was given the corporation, The House that Jack Built; that the notice was insufficient, and the intervening petition not filed within the time required by law. Said Frost was president of said corporation and was served individually and as such president. The first objection, therefore was untenable. What we have already said in considering the Dow Company's claim with respect to the sufficiency of the notice, and the period within which the intervening petition may be filed, applies to the objections to this claim. We find no substantial merit in them.

7. CLAIM OF HENRY MARBLE COMPANY.

This claim was under a sub-contract for the marble work made with the contractor April 30th. The same objections were made to it as to the form of the lien notice heretofore considered, which we have already held are untenable, the notice being substantially like that upheld in the Bernstein case, supra, 186 Ill. App., 67. The notice was filed in the office of the clerk of the Circuit Court under section 25 of said act on August 15th, which was within sixty days from the time the contract was completed, viz., June 19th, when the contract price became due, and the petition was filed within four months of the latter date, viz., October 16, 1914. We fail to find any valid objection to this claim, or any of the claims above considered. The lien allowed for the remaining claim is no longer contested.

additional extra work and for alterations from the architect's plan. Final payment was to be made thirty days from the completion of the work including the extras. The work was completed July 8th, but sub-contractor's notice dated September 17th on The Hoyes that Jack Smith, and also upon Vittrium and Frost personally. The intervening petition was filed December 6th. The objections urged against the claimant are that no notice was given the corporation, The Hoyes that Jack Smith; that the notice was insufficient, and the intervening petition not filed within the time required by law. Said Frost was president of said corporation and was served individually and as such president. The first objection, therefore was unsound. What we have already said in connecting the now Company's claim with respect to the sufficiency of the notice, and the period within which the intervening petition may be filed, applies to the objections to this claim. We find no substantial merit in them.

7. CLAIM OF MONTY BUILDING COMPANY.

This claim was under a sub-contract for the marble work made with the contractor April 8th. The same objections were made to it as to the form of the lien notice hereinbefore considered, which we have already held are untenable, the notice being substantially like that upheld in the Kerrnstein case, supra, 188 Ill. App., 67. The notice was filed in the office of the clerk of the Circuit Court under section 38 of said act on August 13th, which was within sixty days from the time the contract was completed, viz., June 17th, when the contract price became due, and the petition was filed within four months of the latter date, viz., October 16, 1914. We fail to find any valid objection to this claim, or any of the claims above considered, the lien allowed for the remaining claim is no longer questioned.

As a mechanic's lien attaches as of the date of the contract (Boyer v. Keller, 258 Ill., 106) and the several contracts under consideration antedate the recording of the trust deed under which appellant's lien arises, there seems to be no doubt of the priority of said claimant's liens over that of appellant. Accordingly the decree will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

339 - 26111

BERTHE E. MARTIN,
Appellee,

vs.

LOUIS H. FRANK,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 630

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for possession entered upon a directed verdict in a forcible detainer action. Two leases of the premises for the term of two years were executed. They were signed for plaintiff "by Carlson Cooke & Co., Agents." One marked "original" was kept by plaintiff and the other marked "duplicate" was delivered to defendant. The latter differed from the former in that a provision was written on its margin giving the lessee an option "to renew said lease for a further term of two years."

In accordance with a provision in both leases plaintiff gave due notice of her intention to terminate the lease at the expiration of the term, and defendant followed the notice with one that he would avail himself of said option. At the trial plaintiff made proof of her lease without objection, and other requisite proof and rested her case. Defendant then offered the "duplicate" lease in evidence, which, on plaintiff's objection was held inadmissible under the statute of frauds without proof of the agent's written authority to execute it. Thereupon defendant called on plaintiff to produce the "written contract" with her agents. Plaintiff's counsel replied that the notice to produce was insufficient and that they had "no such contract" with them. Defendant then made an offer of secondary evidence to show a written contract between plaintiff

and said agents which the court on objection refused to receive. Defendant then asked leave to withdraw a juror, which was denied. Complaint is made of these several rulings.

Appellant urges that appellee, having by introduction of the "original" lease recognized the authority of her agents to execute it, was estopped from questioning their authority to execute the "duplicate". This contention ignores the fact that the latter was not a "duplicate". Of course, either lease was admissible if there was proper proof of the agent's authority to execute it. The fact that defendant did not object to admission of the so-called "original" lease when offered by plaintiff did not preclude plaintiff from objecting to the admission of a lease containing different provisions without first laying a proper foundation for its introduction, and the mere fact that plaintiff's agents delivered it to defendant did not establish their authority to sign it.

Nor does it follow that because plaintiff introduced the "original" signed by her agents that she ratified their execution of a different instrument. Without proof, therefore, of their authority to execute the so-called "duplicate" lease the court properly sustained the objection to its admissibility.

Nor did the court err in rejecting the offer of secondary evidence. While defendant proved there was a written contract of some kind between plaintiff and her said agents, the offer as to the scope and contents of such contract did not include authority to execute a lease giving such an option as was contained in said "duplicate" lease. Both leases were made out on printed forms, and while alike except as to the written provision for such option, the authority to give such an option cannot be said to be conferred by a general authority to execute

and said agents which the court on objection refused to receive. Defendant then added leave to withdraw a form, which was granted. Complaint is made of these several rulings.

Appellant urges that appellee, having by introduction of the "original" lease recognized the authority of her agents to execute it, was estopped from questioning their authority to execute the "duplicate". This contention ignores the fact that the latter was not a "duplicate". Of course, either lease was admissible if there was proper proof of the agent's authority to execute it. The fact that defendant did not object to admission of the so-called "original" lease then offered by plaintiff did not preclude plaintiff from objecting to the admission of a lease containing different provisions without first laying a proper foundation for its introduction, and the mere fact that plaintiff's agents delivered it to defendant did not establish their authority to sign it.

Nor does it follow that because plaintiff introduced the "original" signed by her agents that the parties thereby executed a different instrument. Either lease, SUCCINCTLY, of their authority to execute the so-called "duplicate" lease the court properly sustained the objection to its admissibility.

Nor did the court err in rejecting the offer of secondary evidence. While authorities proved there was a written contract of some kind between plaintiff and her said agents, the offer as to the scope and contents of such contract did not include authority to execute a lease giving such an option as was contained in said "duplicate" lease. Both leases were made out on printed forms, and while alike except as to the written provision for such option, the authority to give such an option cannot be said to be conferred by a general authority to execute

a lease in accordance with such printed forms.

Nor was there an abuse of judicial discretion in denying leave to withdraw a juror. Defendant knew of both leases when he entered upon the trial and evinced no surprise that plaintiff relied on a different one from that which was in his possession, for he did not object to the introduction of the former as not containing the contract between the parties, and relying on a different lease he must be presumed to have known the necessity of laying a foundation for proving it. He had several days in which to prepare his defense and presumably by due diligence could have presented proof of the agents' authority to sign the "duplicate" lease if it existed. Besides, the ruling of the court in refusing leave to withdraw a juror will not be reviewed except in case of great abuse, (Crane v. Blackman, 100 Ill. App., 565-7; Morrison v. Hedenberg, 138 Ill., 28-29) and no such abuse appears in this case.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

352 - 26131

EDWARD A. SHEDD, Appellant, vs. JOHN C. PATTERSON, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant sued to recover damages for malicious prosecution. This appeal is from the judgment entered upon a verdict of not guilty, both upon the issues raised by the pleadings and upon an attachment in aid.

The several suits, actions and proceedings on which the charge of malicious prosecution is based involve the administration of a trust pertaining to real estate, of which appellee became a beneficiary, and rights growing out of a leasehold interest therein which became vested in appellant during the course of such litigation.

The main object of appellee, Patterson, in such litigation was to free the real estate, in which he had a life interest, from the leasehold and any rights by virtue thereof, and to hold the trustees to an accounting. The questions relating thereto became the subject of review in this court and the Supreme Court and were adjudicated adversely to Patterson's contentions; and in the last of this series of cases, Patterson v. Northern Trust Co., 207 Ill. App., 355, we affirmed the dismissal of a bill in equity brought by said Patterson, to which Shedd was a party defendant, on the ground that it was vexatious and an abuse of process.

In view of the rule that obtains in this state pertaining to a suit for malicious prosecution, as laid down

Appellant, need to recover damages for malicious prosecution. This appeal is from the judgment entered upon a verdict of not guilty, both upon the issues raised by the pleadings and upon an attachment in aid.

The general suits, actions and proceedings on which the charge of malicious prosecution is based involve the administration of a trust pertaining to real estate, of which appellee became a beneficiary, and rights growing out of a lawsuit interest therein which became vested in appellant during the course of such litigation.

The main object of appellee, Patterson, in such litigation was to free the real estate, in which he had a life interest, from the leasehold and any rights by virtue thereof, and to hold the trustees to accounting. The questions relating thereto become the subject of review in this court and the Supreme Court and were adjudicated adversely to Patterson's contentions; and in the last of this series of cases, Patterson v. Northern Trust Co., 407 Ill. App., 595, we affirmed the dismissal of a bill in equity brought by said Patterson, in which there was a prayer for fraudent, on the ground that it was vexatious and an abuse of process.

In view of the rule that obtains in this state

in Smith v. Michigan Buggy Co., 175 Ill., 619, and Morin v. Scheldt Mfg. Co., 297 Ill., 521, it is unnecessary to go into the details of such litigation or the disposition of the issues presented therein. For, as there held and as in the case at bar, where all of the actions and proceedings on which the charge of malicious prosecution is based are ordinary civil actions begun by summons only and not accompanied by arrest of the person or seizure of his property or special injury not necessarily resulting in all suits prosecuted for like causes of action, an action for malicious prosecution will not lie. Nothing is advanced in appellant's argument that takes the case out of the rule thus laid down, and his principal contentions are fully discussed and answered in the Smith and Morin cases referred to. It will serve no purpose, therefore, to reiterate the reasoning of those opinions or to review authorities of other jurisdictions, cited by appellant, that adopt a different rule.

While the case went to the jury on conflicting instructions, one submitted by appellant directing a verdict in his favor, and another given at appellee's request submitting the issues to the jury for determination according to the preponderance of the evidence, yet if neither upon the declaration nor the proof an action would lie and, therefore, appellant was not entitled to a verdict in any event, then he cannot complain of an inconsistency resulting from giving at his own request an instruction to which he was not entitled.

We fail to see that the injuries resulting from these actions were any different in character from those which ordinarily follow similar actions. Even if, as contended by appellant, the several actions and proceedings complained of constituted a "series", having practically the same ultimate object, and disclose an attempt to relitigate adjudicated questions, and were

in Smith v. Michigan Mutual Ins., 170 Ill., 63, and Lewis v. Schmidt Bldg. Co., 297 Ill., 581, it is unnecessary to go into the details of such litigation or the disposition of the issues presented therein. For, as there held and as in the case at bar, where all of the actions are proceedings on which the charge of malicious prosecution is based are ordinary civil actions begun by summons only and not accompanied by arrest of the person or seizure of his property or possible injury not necessarily resulting in all suits prosecuted for like causes of action, an action for malicious prosecution will not lie.

Nothing is advanced in appellants's argument that takes the case out of the rule thus laid down, and his principal contentions are fully discussed and answered in the Smith and Martin cases referred to. It will serve no purpose, therefore, to reiterate the reasoning of those opinions or to review authorities of other jurisdictions, cited by appellants, that adopt a different rule.

While the case went to the jury on conflicting instructions, one submitted by appellant directing a verdict in his favor, and another given at appellee's request submitting the issues to the jury for determination according to the preponderance of the evidence, yet if neither upon the declaration nor the proof an action would lie and, therefore, appellees was not entitled to a verdict in any event, then he cannot complain of an inconsistency resulting from giving at his own request an instruction to which he was not entitled.

We fail to see that the injuries resulting from these actions were any different in character from those which actually follow similar actions. Even if, as contended by appellant, the several actions and proceedings complained of constituted a "series", having practically the same ultimate object, and dis-

pursued until the final suit was declared to be vexatious and an abuse of process, yet none of these things, as we construe the rule above stated, presents an exception to it.

In the view thus taken of the case it becomes unnecessary to discuss any of the other points on which it has been argued and submitted. The judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

86 - 26250

GARDEN CITY BREWERY,
a corporation,
Appellee,

vs.

FRANK KRENEK and ANNA KRENEK,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 631

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The judgment appealed from was upon an unpaid note for $1200 signed by appellants. The defense was that the note was given merely as collateral security for performance of an agreement by appellant Frank Krenek to buy from appellee all beer needed in his saloon for three years from May 3, 1913, and that he fully performed his contract.

The real fact in controversy was whether such an agreement was entered into. If so, there is no question that said Krenek fully complied with its terms, and that the note was given solely as collateral security for its performance.

Krenek had previously, December 30, 1902, entered into a like contract with another company, the United Breweries Company, whereby he agreed to buy beer of that company for three years and to pay said company $1,046.32 for fixtures it had furnished for his saloon if he discontinued buying beer during said period, the company to retain title to the fixtures until said sum was paid. Subsequently, May 2, 1913, said Krenek conferred with appellee's president, Zahrobsky, showed him the contract with the United Breweries Company, and as a result the agreement in question was drawn up by appellee's bookkeeper from the contract with the United Breweries Company, being a precise copy thereof except the date, and that appellee's name was sub-

MR. JUSTICE MARKS DELIVERED THE OPINION OF THE COURT.

The judgment appealed from was upon an unpaid note for $1800 signed by appellants. The defense was that the note was given merely as collateral security for performance of an agreement by appellant Frank French to buy from appellee all beer needed in his saloon for three years from May 8, 1913, and that he fully performed his contract.

The real fact in controversy was whether such an agreement was entered into. If so, there is no question that said French fully complied with its terms, and that the note was given solely as collateral security for its performance.

French had previously, January 7, 1911, entered into a like contract with another company, the United Breweries Company, whereby he agreed to buy beer of that company for three years and to pay said company $1,040.25 for fixtures it had furnished for his saloon if he discontinued buying beer during said period, the company to retain title to the fixtures until said sum was paid. Subsequently, May 8, 1913, said French conferred with appellee's president, Lutofsky, showed him the contract with the United Breweries Company, and as a result the agreement in question was drawn up by appellee's solicitor from the contract with the United Breweries Company, being a strange very limited except the date, and that appellee's name was

FRANK KLEMZ and ANNA KLEMZ,
Appellants.

vs.

UNITED BREWERIES COMPANY,
a corporation,
Appellee.

ERROR TO CHICAGO.

APPEAL FROM SUPERIOR CT.

stituted for said company, and the sum of $1200 for $1,046.32. Thereupon appellee gave Krenek its check for $1200 from which he paid the United Breweries Company for the fixtures so that the title thereto was in effect transferred to appellee. At the same time Krenek and his wife signed the note in question. He testified that there was no other consideration therefor than what such contemporary agreement shows and that it was signed at Zahrobsky's request to have "something in hand for the $1200 to show the transfer of the fixtures."

The parties differed in their version of the transaction. In fact, appellee claims that the note represents a loan of $1200 and that there was no accompanying agreement. Appellants claim there was such an agreement, and that the note was given only as collateral thereto. The agreement expressly provided, like that of the United Breweries Company, that he would buy beer from appellee during the ensuing three years from May 3, 1913, and that the title to such fixtures should remain in appellee, but that in case he discontinued to buy beer from appellee within such period he should pay $1200 for the fixtures. It was drawn up and signed at appellee's instance, and appellee furnished the $1200 manifestly to buy the fixtures for itself. All the circumstances tend strongly to support appellant's theory of the transaction and are strengthened by contradictory, inconsistent and equivocal testimony of both Zahrobsky and appellee's bookkeeper, who drew the agreement, which we do not deem necessary to set forth. Appellant Frank Krenek not only continued to buy beer of appellee during the three years as the agreement provided he would do, but for more than two years longer. It was a demand note, and if there was no such agreement it is strange that no attempt to collect such note was made during said five years.

Again, when the note was given appellee did not know

stituted for said company, and the sum of $1800 for $4,044.52. Thereupon appellee gave French its check for $1800 from which he paid the United Breweries Company for the fixtures so that the title thereto was in effect transferred to appellee. At the same time French and his wife signed the note in question. He testified that there was no other consideration therefor than what such contemporary agreement shows and that it was signed at Amrhein's request to have "something in hand for the $1800 to show the transfer of the fixtures."

The parties differed in their version of the transaction. In fact, appellee claims that the note represents a loan of $1800 and that there was no accompanying agreement. Appellants claim there was such an agreement, and that the note was given only as collateral thereto. The agreement expressly provided, like that of the United Breweries Company, that he would buy beer from appellee during the ensuing three years from May 4, 1912, and that the title to such fixtures should remain in appellee, but that in case he discontinued to buy beer from appellee within such period he should pay $1800 for the fixtures. It was drawn up and signed at appellee's instance, and appellee furnished the $1800 manifestly to buy the fixtures for itself. All the circumstances tend strongly to support appellant's theory of the transaction and are strengthened by contradictory, inconsistent and equivocal testimony of both Amrhein and appellee's bookkeeper, who drew the agreement, which we do not deem necessary to set forth. Appellant Frank French not only continued to buy beer of appellee during the three years as the agreement provided he would do, but for more than two years longer. It was a demand note, and if there was no such agreement it is strange that as attorney to collect such note was made during said five years.

or inquire into Krenek's financial ability, and knew from the agreement with the United Breweries company that the fixtures belonged to it and not to him. Nor did it refute the claim that it entered into like agreements with other customers whereby it was accustomed to hold title to fixtures furnished to its customers on similar terms. Nor is it reasonable in view of the undisputed evidence that appellee entered into like contracts with other customers, that it should have had no agreement with appellant Frank Krenek, and having no knowledge of his financial ability would have advanced such a sum of money without some such agreement or some form of security.

It was also admitted that if Anna Krenek were present as a witness she would testify that when she signed the note it was upon representations by appellee's president which corresponded with her husband's sworn version of the transaction, and there was no denial of his making such representations.

Appellee makes the point that it did not sign the contract. This is immaterial, both parties having apparently complied with its terms.

We think the agreement produced by appellants represented the actual agreement of the parties, and that the note was given merely as collateral thereto. Hence the judgment should be reversed with a finding of fact.

REVERSED WITH FINDING OF FACTS.

Gridley, P. J., and Morrill, J., concur.

86 - 26250

FINDING OF FACTS.

We find that appellee, Garden City Brewery, entered into a contract with appellant Frank Krenek, May 2, 1913, whereby it furnished his saloon with a saloon outfit costing $1200, and that the title to said outfit was to remain in appellee, in consideration of which appellant Frank Krenek agreed to buy from appellee all the beer needed in his said saloon for three years therefrom, and whereby in case he discontinued to buy beer from appellee during said three years he was to pay at the time of such discontinuance the sum of $1200 for such outfit, and that at the time he entered such contract appellants gave the note herein sued on without any additional consideration and merely to secure the performance of such contract by appellant Frank Krenek, and we further find that he had fully performed said contract before demand for the payment of said note and before the institution of this suit.

141 - 26308

JOSEPH B. MALKEWICZ,
Appellee,

vs.

ADOLPH FELDSCHREIBER,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer brought in the Municipal Court of Chicago. The verdict was for plaintiff (the appellee) who held a lease of the premises from the owner for one year beginning May 1, 1920, executed April 19, 1920. Appellant (the defendant) was at the latter date and at the time of this trial in possession of the premises under a lease expiring April 30, 1920. It appears that he tried to obtain a written lease for another year beginning May 1, 1920, and the real question at issue was whether one was executed.

Appellant claimed that prior to the execution of the lease plaintiff, the owner's agent, submitted a written one to him which he signed and left with such agent, and introduced other evidence than his own in support of that contention. On the other hand, the agent testified that the lease tendered for appellant's signature was unsigned, they being unable to agree upon the terms. Prior to the institution of this suit appellant filed a sworn bill in equity to enforce the terms of his claimed lease and averred therein that it was an oral lease. This sworn admission contradictory of his sworn evidence in this case was undoubtedly given much weight by the jury, and notwithstanding the greater number of witnesses for defendant as to the signing of the lease, we cannot say that the verdict was manifestly against the weight of the evidence, as appellant contends.

111 - 28800

Action in ejectment.

"Appellee.

vs.

Landlord and tenant.

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MARKS delivered the opinion of the court.

This is an action of forcible detainer brought in the Municipal Court of Chicago. The verdict was for plaintiff (the appellee) who held a lease of the premises from the owner for one year beginning May 1, 1929, expiring April 30, 1930. The defendant (the defendant) was at the latter date and at the time of this trial in possession of the premises under a lease expiring April 30, 1930. It appears that he tried to obtain a written lease for another year beginning May 1, 1930, and the real question at issue was whether one was executed.

Appellant claimed that prior to the expiration of the lease plaintiff, the owner's agent, submitted a written one to him which he signed and left with that agent, and introduced other evidence than his own in support of that contention. On the other hand, the agent testified that the lease tendered for appellant's signature was unsigned, they having unable to agree upon the terms. Prior to the institution of this suit appellant filed a cross bill in equity to enforce the terms of his claimed lease and averred therein that it was an oral lease. This cross claim was dismissed at his cross evidence in this case was unsatisfactory and given much weight by the jury, and notwithstanding the greater number of witnesses for defendant as to the signing of the lease, we cannot say that the verdict was manifestly against the weight of the evidence, as appellant contends.

Nor can we agree with his contention that said bill in equity was not admissible in evidence because the suit was not between the parties to this action. It was competent and properly received as an admission against defendant's interests respecting the very matter at issue in this case. (Wadsworth v. Duncan, 164 Ill., 360, 366; Callaghan v. American Trust & Savings Bank, 196 Ill. App., 102.)

It is also claimed that a copy of a letter from the owner to defendant, dated March 11, 1930, was received in evidence without laying a foundation therefor, but it appears from the record that the foundation was subsequently laid and the error thus corrected.

Certain conversations had with a brother of defendant not in the latter's presence were received in evidence over objections that there was no evidence of his agency to speak respecting such matters and bind defendant. They were with reference to securing another lease for the premises after he and defendant claimed a written lease was left with plaintiff's agent. While probably the circumstances might support the inference of agency and such conversations unexplained, if had, were perhaps admissible as inconsistent with his claimed knowledge of the previous execution of a lease to defendant, yet we do not think they were of such a nature as to have any appreciable effect upon the jury's reaching its conclusion upon the main issue.

Defendant called on plaintiff to produce the alleged written lease. If it existed, the proper procedure for its production was by service of a subpoena duces tecum on the owner or his agent, one of whom presumably had possession of it, if, as defendant claimed, he left it with said agent. The agent testified that the original lease was unsigned and had been destroyed, and, in view of such notice to produce he was asked

Nor can we agree with his contention that said bill in equity was not admissible in evidence because the suit was not between the parties to this action. It was competent and properly received as an admissible equitable instrument. Substantially controlling the very matter at issue in this case. (Mahurkar v. Hansen, 164 Ill., 568, 572; Gallagher v. American Trust & Savings Bank, 124 Ill. App., 180.)

It is also claimed that a copy of a letter from the owner to defendant, dated March 11, 1926, was received in evidence without laying a foundation therefor, but it appears from the record that the foundation was subsequently laid and the error thus corrected.

Certain conversations had with a brother of defendant and at the lighter pretense with reference to evidence are objectionable that there was no evidence of his agency to speak representing such matters and bind defendant. They were with reference to securing another lease for the premises after he had defendant claimed a written lease was left with plaintiff's agent. While probably the circumstances might support the inference of agency and such conversations unexplained, it had been perhaps admissible as incontrovertible with his claims therefore of the previous execution of a lease to defendant, yet we do not think they were of such a nature as to have any appreciable effect upon the jury's reaching its conclusion upon the main issue.

Defendant relied on plaintiff to produce the alleged written lease. If it existed, the proper procedure for its production was by service of a subpoena duces tecum on the owner or his agent, the of whom presumably had possession of it, if, as defendant claimed, he left it with such agent. The agent testified that the original lease was mislaid and had been

by plaintiff to produce a copy he had made from memory, to which defendant objected. This evidence could have had no appreciable influence upon the minds of the jury if they believed that the lease, whatever its contents, was never signed.

Complaint is made both of the argument by counsel, and remarks of the court during the trial. We find nothing seriously objectionable in either. The inconsistency of defendant's attorney in seeking to enforce the lease in equity on the theory that it was an oral lease, and to defend this suit on the theory of a written lease, being the same attorney in both suits and acting as defendant's agent, came, we think, within the purview of proper comment on the main issue whether there was a written lease. There was no legal defense to this suit if the lease was not in writing, and said attorney was not only presumably acquainted with the issues, but it was in evidence that he had sworn defendant to the bill and therefore to a different state of facts from what he was urging in this case.

Appellant's contention that the Municipal Court had no jurisdiction of the cause of action because the Municipal Court Act does not provide for the issuance of a summons therein has been adversely decided by this court in a similar case where, as here, the defendant entered his appearance. (Szulerecki v. Oppenheimer, 218 Ill. App., 508.)

We have carefully reviewed the record in this case and while perhaps it is not free from errors we do not think they are such as would justify a reversal. The judgment will be affirmed and the clerk will include in the costs the cost of an additional abstract.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

by plaintiff to produce a copy he had made from memory, to which defendant objected. This evidence could have had no appreciable influence upon the minds of the jury if they believed that the lease, whatever its contents, was never signed.

Counsel's made both of the arguments by counsel, and remarks of the court during the trial. We find nothing seriously objectionable in either. The inconsistency of defendant's attorney in seeking to enforce the lease in equity on the theory that it was an oral lease, and to defend this suit on the theory of a written lease, being the same attorney in both suits and acting as defendant's agent, [illegible], [illegible] the review of [illegible] on the main issue whether there was a written lease. There was no legal reason to bar plaintiff if the lease was not in writing, and said attorney was not only presumably acquainted with the lease, but it was in evidence that he had sworn defendant to the bill and therefore in a different state of facts from what he was arguing in this case.

Appellant's contention that the Municipal Court had no jurisdiction of the cause of action because the Municipal Court Act does not provide for the issuance of a summons therein has been adversely decided by this court in a similar case where, as here, the defendant entered his appearance. [illegible] v. [illegible], 212 Ill. App., 502.)

We have carefully reviewed the record in this case and while perhaps it is not free from errors we do not think they are such as would justify a reversal. The judgment will be affirmed and the clerk will insert in the costs the cost of an additional abstract.

AFFIRMED.

[illegible], P. J., and [illegible], J., concur.

188 - 26361

JOSEPH VILLANOVA,
Appellant,

vs.

ANDREW HIGGINS,
Appellee.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from the refusal of the County Court to discharge appellant on his petition to be discharged from custody under the Insolvent Debtors' Act, the court finding that malice was the gist of the action in which the judgment on which the capias was ordered was rendered. As each count of the declaration in said action charged appellant with assault and battery vi et armis and robbery, there is no room for discussion as to the correctness of that finding.

Appellant's brief and argument are predicated on a failure of the record to show compliance with the requirements of section 62 of the statute of judgments authorizing an execution against the body of a debtor when, after a return nulla bona, certain facts are set forth by affidavit, whereas, the files and record introduced in evidence show that he was taken in custody under section 5 of said statute, authorizing such an execution when a judgment, as in the case at bar, has been obtained for a tort committed by him. In such a case the ca sa may issue without a preliminary issue of an execution for a levy on property or the filing of an affidavit. (Barney v. Chapman, 21 Fed. Rep., 903.) Appellant's argument and cases cited, therefore, are inapplicable to the question at issue. Malice being the gist of the action the County Court was without jurisdiction to grant his petition. No authorities need be cited this late day on that subject.

This appeal is from the refusal of the County Court to discharge appellant on his petition to be discharged from custody under the Imprisonment Debtors' Act, the sole finding that matter was the plot of the action in which the judgment on which the capias was endorsed was rendered. In each count of the declaration in said action charged appellant with assault and battery vi et armis and robbery, there is no room for discussion as to the correctness of that finding.

Appellant's brief and argument are predicated on a failure of the record to show compliance with the requirements of section 60 of the statute of judgments authorizing an execution against the body of a debtor when, after a return nulla bona, writs of fieri facias are issued by affidavit. However, the file and record introduced in evidence show that he was taken in custody under section 8 of said statute, authorizing such an execution when a judgment, or in the case at bar, has been obtained for a tort committed by him. In such a case the ca. sa. may issue without a preliminary issue of an execution for a levy on property or the filing of an affidavit. (Barney v. Thomson, 11 Ser. and Rawl. 241.) Appellant's contention that other cases, therefore, are inapplicable to the question at issue, besides being the plot of the action the County Court was without jurisdiction to grant his petition. No authorities need be

Whether the Superior Court which entered the judgment and ordered the capias complied with the requisite formalities in entering such order was not open to review or inquiry in the County Court, the latter's jurisdiction being limited to determining whether or not malice was the gist of the action. It, therefore, properly refused to hear evidence bearing on that subject. Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

212 - 26385

CENTRAL LIME & CEMENT COMPANY, a corporation, Appellee,	APPEAL FROM
vs.	SUPERIOR COURT,
	COOK COUNTY.
H. G. GOELITZ COMPANY, a corporation, Appellant.	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The judgment appealed from was entered upon a verdict assessing plaintiff's damages at $670. It rests upon the charge and attempt to prove a breach of contract to purchase cement.

Among other points urged by appellant is that the contract does not obligate it to take or pay for any cement not delivered.

The contract after referring to plaintiff as "seller," and defendant as "purchaser," and reciting that the latter had entered into a contract to construct pavement on certain streets in Berwyn and Oak Park, Illinois, sets forth their respective agreements as follows:

"I. The Seller agrees:

(1) To furnish, sell and deliver to the purchaser, on the street, all the Portland cement required, approximately 14,000 bbls. in the concrete base of the above mentioned pavement.

(2) To deliver in such quantities and at such times as the purchaser may direct.

II. The Purchaser agrees:

(1) To pay to the Seller, two and 41/100 (2.41) Dollars per bbl. for all cement delivered."

The writing then proceeds to state that the purchaser will be entitled to any decline in the market price, that certain discounts will be allowed if payments are made 30 days after date

The judgment appealed from was entered upon a verdict assessing plaintiff's damages at $670. It rests upon the charge and attempt to prove a breach of contract to produce summit.

Among other points urged by appellant is that the contract does not obligate it to take or pay for any cement not delivered.

The contract after referring to plaintiff as "seller," and defendant as "purchaser," and reciting that the latter had entered into a contract for construct pavement on certain streets in Berwyn and Oak Park, Illinois, sets forth their respective agreements as follows:

"I. The Seller agrees:

(1) To furnish, sell and deliver to the purchaser, on the street, all the portland cement required, approximately 14,000 bbls. in the concrete base of the above mentioned pavement.

(2) To deliver in such quantities and at such times as the purchaser may direct.

II. The purchaser agrees:

(1) To pay to the seller, two and 11/100 (2.11) Dollars per bbl. for all cement delivered."

The written than proceeds to state that the purchaser will be entitled to any decline in the market price, that certain

of invoice; that overdue accounts will draw interest from such date; that the purchaser will pay all freight charges and be credited on the account with such payments; that any change in freight rates will be added or taken from the price, and that the seller will not be responsible for delays, etc.

The above is the substance of their respective and mutual undertakings.

The agreement contains no express undertaking on the part of the purchaser to purchase or receive all the cement required in carrying out its said contracts. In this respect it differs from the facts in the cases cited by appellee, Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill., 89, and National Furnace Co. v. Keystone Manf. Co., 110 Ill., 474, where contracts were held not void for want of mutuality in not specifying the quantity of goods required or needed, and where there was an express agreement to buy what was required or needed. In the instant case there is no such express agreement or anything from which such an obligation can properly be implied. The only express agreements by the purchaser are that it will pay a certain price "for all cement delivered," and the freight charges, but the contract nowhere obligates it to purchase or pay for all the cement it may require. Hence the contract is wanting in mutuality and could not be enforced on a refusal to take cement tendered under it.

But no cement was delivered or formally tendered. The alleged breach rests on an alleged refusal of defendant to call for or permit delivery. However, if defendant was not obligated to take cement not delivered such a refusal would constitute no breach of the contract.

But, even if the contract was binding on appellant to take all the cement required to fulfill its paving contract, we

of Insolvency, that written instruments will give interest from such date; that the purchaser will pay all freight charges and be credited on the account with such payments; that any change in freight rates will be added or taken from the price, and that the seller will not be responsible for delays, etc.

The above is the substance of their respective and mutual understandings.

The agreement contains no express undertaking on the part of the purchaser to purchase or receive all the cement required in carrying out its said contracts. In this respect it differs from the cases in the courts cited by appellee, Kinnunen Lumber Co. v. Midwestern Coal Co., 168 Ill., 88, and Mitchell Furnace Co. v. Furnace Coal Co., 140 Ill., 404, where contracts were held not void for want of mutuality in not specifying the quantity of goods required or needed, and where there was an express agreement to buy what was required or needed. In the instant case there is no such express agreement or anything from which such an obligation can properly be implied. The only express agreements by the purchaser are that it will pay a certain price "for all cement delivered," and the freight charges, but the contract nowhere obligates it to purchase or pay for all the cement it may require. Hence the contract is wanting in mutuality and could not be enforced on a refusal to take cement tendered under it.

But no cement was delivered or formally tendered. The alleged breach rests on an alleged refusal of defendant to call for or permit delivery. However, if defendant had the privilege to take cement not delivered upon a refusal could accelerate an breach of the contract.

Yet, even if the contract was binding on defendant in

think the defense made that appellee first breached and canceled the contract is supported by a preponderance of the evidence.

The contract is dated in November, 1917, and while there is nothing in it as to when and in what amounts deliveries were to be made, it seems to have been understood that they would not be required before the month of April when paving work is usually begun. There appears to have been no communication between the parties respecting the contract after it was made and before April except through a telephone conversation in January, 1918, between H. W. Goelitz, president of defendant, and Matt L. McLaughlin, secretary and treasurer of plaintiff, who seems to have had control of the matter for plaintiff. It appears that plaintiff had sued defendant about that time on another deal, and Goelitz testified that because of that fact and its possible effect on their future relations he called up said McLaughlin on the telephone to inquire about them and was told by the latter that the cement would not be furnished - that the contract was canceled. He further testified that he thereupon asked that the fact be put in writing, and was told "you have got it good enough over the telephone, I am through with you, I will not deliver you any more goods"; that he then requested Matt's brother to intercede, but the latter said: "As long as you are in a dispute with Matt I cannot interfere; whatever he says, goes;" that thereupon he to cover loss made a contract for cement with another company, as the price was increasing.

Both of the McLaughlins were called to rebut this testimony but without denying such conversation, or having a conversation, or such an occasion for one, they merely testified that they did not "recall it." We cannot deem such negative testimony as overcoming positive statements to which the circumstances of the case give the color of verity. Defendant immediately afterwards felt obliged to make another contract which required it to pay a higher price for cement, and it hardly comports with reason

link the defence made that appellee first breached and concealed the contract is supported by a preponderance of the evidence.

The contract is dated in November, 1917, and while there is nothing in it as to when and in what amounts deliveries were to be made, it seems to have been understood that they would not be required before the month of April when racing work is usually begun. There appears to have been no communication between the parties respecting the contract after it was made and before April except through a telephone conversation in January, 1918, between E. C. Doolittle, president of defendant, and Matt L. Kimmylidis, secretary and treasurer of plaintiff, who seems to have had control of the matter for plaintiff. It appears that plaintiff had made inquiry of the defendant about that time on another head, and Doolittle testified that because of that fact and the possible effect on their future relations he called up said Kimmylidis on the telephone to inquire about them and was told by the latter that the contract would not be furnished - that the contract was concealed. He further testified that he thereupon asked that the fact be put in writing, and was told "you have got it good enough over the telephone, I am through with you. I will not deliver you any more goods"; that he then requested Katz's brother to intervene, but the latter said: "As long as you are in a dispute with Matt I cannot interfere; whatever he says, goes;" that thereupon he to cover loss made a contract for cement with another company, as the price was increasing.

Both of the Kimmylidis were called to repeat this testimony but objected that said conversation, or "talking - [illegible] talking, or such as occasion for me, they merely insisted that they did not "recall it." In reason does such negative testimony as overcoming positive statements to which the circumstances of the case give the color of verity. Referring immediately after [illegible] to make another [illegible] it is

that parties interested in a contract of such magnitude should recall no conversation respecting its cancellation.

The only other communication between the parties respecting the matter was in April. Desirous of saving the extra price he would have to pay for cement Ooslitz called up Kilgallen, plaintiff's sales agent, in April and asked him if plaintiff "would be willing to deliver the cement on the old contract that McLaughlin canceled." Kilgallen said that he did not know but would find out. Calling up Kilgallen again and being told that plaintiff was willing, he then said: "I will have to see if the other people will cancel their contract." Ooslitz testified that finding he could not be released from the other contract he again called back and told Kilgallen he would have to take the cement from the other people. On the following day plaintiff wrote defendant saying, "so that there will be no misunderstanding * * * kindly let us have your instructions in writing, giving at least one day's notice (and as much more as you can) as to when you want to begin delivery, what amount you want, and where delivery is to be made, etc." This letter was not answered.

These communications in April were immaterial to the issues if plaintiff first breached the contract and there was no restoration of their relations. Kilgallen and Ooslitz do not agree as to the import of the conversation between them, and while we think the latter's construction of the same and of said letter is the more consistent with preceding circumstances, there was no preponderance of evidence in plaintiff's favor. In fact, we think the preponderance was the other way, showing that plaintiff first breached the contract. Plaintiff was, therefore, in no position to enforce it.

But if the contract were binding on appellant and it had breached it, yet we think there is also a preponderance of evidence against the claim of resulting damages. For if after

that parties interested in a contract of such magnitude should recall no conversation respecting its cancellation.

The only other communication between the parties respecting the matter was in April. Instead of paying the extra price he would have to pay for cement Doelitz called up Kilgallen, plaintiff's sales agent, in April and asked him if plaintiff would be willing to deliver the cement on the old contract that Malmquistin cancelled." Kilgallen said that he did not know but would find out. Calling up Kilgallen again and being told that plaintiff was willing, he then said: "I will have to see if the other people will cancel their contract." Doelitz testified that finding he could not be released from the other contract he again called back and told Kilgallen he would have to take the cement from the other people. In the following day plaintiff wrote defendant saying, "so that there will be no misunderstanding * * * kindly let us have your instructions in writing, giving at least one day's notice (and as much more as you can) as to when you want to begin delivery, what amount you want, and where delivery is to be made, etc." This letter was not answered.

These communications in April were immaterial to the issues if plaintiff first breached the contract and there was no reinstatement of their relations. Kilgallen and Doelitz do not agree as to the import of the conversation between them, and while we think the latter's construction of the case and of said letters is the more consistent with proceeding circumstances, there was no preponderance of evidence in plaintiff's favor. In fact, we think the preponderance was the other way, showing that plaintiff first breached the contract. Plaintiff was, therefore, in no position to enforce it.

But if the contract were binding on appellant and it had breached it, yet we think there is also a preponderance of

the contract was made the market price of cement continued to increase, as the evidence strongly tends to show, then under the familiar rule which limits recovery to the difference between the contract price and the fair market value of the goods at the time and place of delivery, plaintiff suffered no real damage.

What may have properly influenced the jury on the subject of damages was the contracts plaintiff had made with certain cement manufacturers for the cement at certain prices, which were received in evidence over defendant's objection. These contracts contained a proviso - apparently in restraint of trade - that "use of the cement in any other work than that specified, or disposition of it for any other purpose or resale of it to other than M. G. Goelitz Company, shall give the company the option to terminate this contract and refuse to deliver any more cement under it." These contracts were not binding on defendant, who was not a party thereto, and had no material bearing on the issues except as they might show that plaintiff was ready, able and willing to carry out its contract. They should, however, have been limited to that purpose. But they evidently influenced the jury on the question of damages for in spite of proper instructionson the measure of damages their verdict was based on the difference between what plaintiff was to pay for the cement under such contracts, and the contract price to defendant. And in determining that plaintiff had suffered damages the jury may also have considered the restriction put upon plaintiff's right in said contracts to sell the cement to any one except defendant.

We think, therefore, that both upon the law and the evidence defendant was entitled to a verdict; upon the law because it was not obligated to take the cement, and, therefore, was entitled to a directed verdict, as asked for, and upon the evidence because the greater weight thereof shows that plaintiff first

the contract was made the market price of cement continued to increase, so the evidence strongly tends to show, then under the facility with which India receives it the difference between the contract price and the fair market value of the goods at the time and place of delivery, plaintiff suffered no real damage.

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We think, however, that both upon the law and the evidence defendant was entitled to a verdict; upon the law because it was not obligated to take the cement, and, therefore, was entitled to a directed verdict. As asked for, and upon the evidence because the jury's verdict which covered those two plaintiff's first

breached the contract, and that it in fact suffered no damages.

Accordingly the judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Morrill, J., concur.

212 - 26385

FINDING OF FACT.

We find that appellant, H. G. Goelitz Company, did not refuse to receive or permit the delivery to it of cement under the contract declared on until after appellee had first refused to deliver the same, and that appellee suffered no damages from such refusal.

257 - 26431

ALBERT D. QUAN, doing business as A. D. Quan & Company, Appellee, vs. MARGARET E. TAYLOR, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit for a real estate broker's commissions. The question in dispute was whether, as contended by plaintiff, the contract for his agency was unconditional, or as claimed by defendant, conditional, on plaintiff's obtaining the consent of one Carroll, another real estate agent with whom defendant had a written contract to give the exclusive agency for the sale of her property, to pay him 3 per cent commission and not to appoint another agent without his consent.

That she had entered into such a contract with Carroll; that afterwards plaintiff had solicited her by letter to list her real estate with him if it was for sale and to give the terms of sale on an enclosed postal card; that getting no reply to his letter he called her up by telephone and made the same request; that thereupon she sent him the postal card containing her terms of sale; that he found a customer ready, able and willing to comply with such terms, and presented to her a written contract of same embodying them; that she refused to sign such contract on the ground that he had made no arrangement with said Carroll, are all undisputed facts.

In support of her affidavit of merits defendant testified that as a part of her conversation over the telephone she informed plaintiff of her agreement with Carroll and told him that if she listed her property with him he must look to Carroll for the

This is a suit for a real estate broker's commission.

The question in dispute was whether, as contended by PLAINTIFF, the contract for his agency was unconditional, or as claimed by defendant, conditional, on plaintiff's obtaining the consent of one Carroll, another real estate agent with whom defendant had a written contract to give the exclusive agency for the sale of her property, to pay him 6 per cent commission and not to appoint another agent without his consent.

Then she had entered into such a contract with Carroll; that afterwards plaintiff had solicited her by letter to list her real estate with him if it was for sale and to give the terms of sale on an enclosed postal card; that getting no reply to his letter he called her up by telephone and made the same request; that thereupon she sent him the postal card containing her terms of sale; that he found a purchaser ready, able and willing to comply with such terms, and procured to her a written contract of same embodying them; that she refused to sign such contract on the ground that he had made no arrangements with said Carroll, who did undertake to sell.

In support of her affidavit of merits defendant testified that as a part of her conversation over the telephone she informed plaintiff of her contract with Carroll and tell him that if he

commission; that plaintiff replied that such an arrangement was agreeable, and that it was only with that understanding she mailed the postal card. Plaintiff denied that any such condition was imposed.

The contract between them rested in the correct version of such telephone conversation of which they alone had direct knowledge. Each was apparently equally credible and unimpeached, and if in such a state of the case we apply as a test of the preponderance of the evidence the reasonableness of either version, it would seem to favor defendant. The fact that she had such a contract with Carroll made it reasonable that she would wish to comply with it and thus save possible liability for double commissions, and her admitted insistence upon having Carroll's consent when plaintiff asked her to sign the contract of sale was entirely consistent with her having previously imposed such a condition to plaintiff's agency.

But there being no facts or circumstances to corroborate plaintiff's version there was no preponderance of evidence under such a state of the case to sustain a verdict in his favor.

It was said in Broughton v. Smart, 59 Ill., 440:

> "A party, holding the affirmative of a proposition, is required to maintain it by a preponderance of evidence, which can never be the case when one of two parties, both equally credible, makes an assertion which is denied by the other."

This doctrine has been adhered to in many later decisions and is usually applied when, as in the case at bar, there is nothing in the facts and circumstances of the case to corroborate plaintiff's assertion. But where, as here, the circumstances lend greater reasonableness if not credence to defendant's assertion then it is clearly our duty to reverse the judgment as manifestly against the weight of the evidence. Accordingly the judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Morrill, J., concur.

commissioner, that minimally satisfied that such an arrangement was agreeable, and that it was only with that understanding she waited her final court. Plaintiff denied that any such understanding was agreed.

The accounts between them treated in the correct version of such telephone conversations of which they alone had direct knowledge. Such was apparently credible and reasonable, and if in such a state of the case we apply as a test of the preponderance of the evidence the reasonableness of either version, it would seem to favor defendant. The fact that she had such a contract with Garrett made it reasonable that she would wish to comply with it and thus have possible liability for double commissions, and her admitted inadvertence upon having Garrett's consent when plaintiff asked her to sign the contract of sale was entirely consistent with her having previously imposed such a condition to plaintiff's agency.

But there being no facts or circumstances to corroborate plaintiff's version above and no preponderance of evidence under such a state of the case to sustain a verdict in his favor.

It was said in Pennington v. Smith, 59 Ill., 448:

> "A party, holding the affirmative of a proposition, is required to maintain it by a preponderance of evidence, which can never be the case when one of two parties, both equally credible, makes an assertion which is denied by the other."

This doctrine has been adhered to in many later decisions and is usually applied when, as in the case at bar, there is nothing in the facts and circumstances of the case to distinguish plaintiff's character. But where, as here, the circumstances lend material reasonableness to and evidence to defendant's assertion then it is clearly our duty to reverse the judgment as manifestly against the weight of the evidence. In modality the judgment will be reversed with a finding of fact.

JUDGMENT REVERSED AND FINAL.

257 -26431

FINDING OF FACT.

We find that appellant, Margaret M. Taylor, listed the real estate in question with appellee, Albert D. Quan, only upon condition that appellee should first procure the consent of one William H. Carroll to his agency and arrange with him for any commission, and that appellee failed to comply with such condition.

13 - 25848

PEOPLE OF THE STATE OF ILLINOIS ex rel. AUGUSTIN GILMORE and FLORENCE GILMORE,
Defendants in Error,

vs.

LORETTA CAREY and ALMA PEDERSEN,
Plaintiffs in Error.

ERROR TO SUPERIOR COURT, COOK COUNTY.

222 I.A. 632

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

By writ of error, which has been made a supersedeas, plaintiff in error seeks a reversal of the decree of the Superior Court in a habeas corpus proceeding to determine the custody of one John Gilmore, also called Norman Verne Redmond, a child now about four years of age, a son of Loretta Carey, one of the respondents and the plaintiff in error.

The case was heard in the Superior Court upon the petition, answer and evidence. The petition alleges in substance that the defendants in error, who were the petitioners in the court below, took into their home the child mentioned at the request of the plaintiff in error, who was the mother of the child, and one Alma Pedersen; that the child had been in their custody from November 20, 1917, to December 3, 1919; that on the last mentioned date he was taken from their home and unlawfully restrained of his liberty by the respondents and that the petitioners are financially and otherwise well able to care for the child. The answer alleged that the child was not unlawfully restrained of its liberty and was in the custody of his mother; that while she had consented to giving the custody of the child to the petitioners, her consent was obtained and based upon the belief and specific assurance of the petitioners that they would immediately adopt the child;

By writ of error, which has been made a supersedeas, plaintiff in error seeks a reversal of the decree of the superior Court in a habeas corpus proceeding to determine the custody of one John Gilmore, also called Herman Verne Redmond, a child now about four years of age, a son of Loretta Gray, one of the respondents and the plaintiff in error.

The case was heard in the Superior Court upon the petition, answer and evidence. The petition alleges in substance that the defendants in error, who were the petitioners in the court below, took into their home the child mentioned at the request of the plaintiff in error, who was the mother of the child, and one Alex Pedersen; that the child had been in their custody from November 20, 1917, to December 3, 1918; that on the last mentioned date he was taken from their care and unlawfully restrained of his liberty by the respondents and that the petitioners are financially and otherwise well able to care for the child. The answer alleges that the child was not unlawfully restrained of his liberty and was in the custody of his mother; that while she had consented to giving the custody of the child to the petitioners, her consent was obtained and based upon the belief and specific assurance of

that petitioners had failed to do so, although the child had been in their custody for a period of two years. The decree of the Superior Court found that the child had been illegally detained and restrained under the custody of the respondents and that petitioners were entitled to the custody of the child. The questions involved in this case have all been passed upon by this court in recent cases.

It was held in People ex rel. Brumager v. Johnson, 209 Ill. App. 324, as follows:

> "In cases of this sort it is the rule that the principal consideration moving the court is the welfare of the child, and where opposing claimants are equally fit and responsible, courts will favor the claims of those who stand in relationship to the child."

In the case at bar there is but little evidence as to the financial responsibility of either of the parties to the suit. The trial court excluded all evidence upon this subject, which we regard as a very material point in the determination of the case. So far as the record discloses, it may at least be said that the responsibility of the petitioners is not shown to be any greater than that of the mother.

As held in People v. Bryson, 203 Ill. App. 305, the mother of a child is its natural guardian and custodian and her right will not be infringed or curtailed unless there is something in her life and conduct which makes her an undesirable character to be entrusted with its care and education. The court said on a former appeal, 198 Ill. App. 171: "The law jealously upholds and protects that right (the mother's right to the custody of her own child), unless it has been forfeited by absolute relinquishment or some course of conduct or conditions that render its assertion incompatible with parental claim and the child's best interest," citing authorities.

that petitioners had failed to do so, although the child had been in their custody for a period of two years. The decree of the Superior Court found that the child had been illegally detained and restrained under the custody of the respondents and that petitioners were entitled to the custody of the child. The questions involved in this case have all been passed upon by this court in recent cases.

It was held in Ruggie ex rel. v. Brunscher, Judgmen, 200 Ill. App. 564, as follows:

> "In cases of this kind it is the rule that the primary consideration moving the court is the welfare of the child, and where opposing claimants are equally fit and responsible, courts will favor the claims of those who stand in relationship to the child."

In the case at bar there is but little evidence as to the financial responsibility of either of the parties to the suit. The trial court excluded all evidence upon this subject, which we regard as a very material point in the determination of the case. So far as the record discloses, it may at least be said that the responsibility of the petitioners is not shown to be any greater than that of the mother.

As held in Ruggie v. Brunner, 200 Ill. App. 508, the mother of a child is its natural guardian and custodian and her right will not be infringed or unfriendly unless there is something in her life and conduct which makes her an undesirable character to be entrusted with the care and education. The court said on a former appeal, 198 Ill. App. 171: "The law jealously upholds and protects that right (the mother's right to the custody of her own child), unless it has been forfeited by absolute relinquishment or some course of conduct or conditions that render its exercise incompatible with paramount claims and the child's best interest, taking circumstances

Unless it appears that the mother is unfit to have the care and custody of her child, or that she is financially unable to properly care for the child, or that her environment is such as to be detrimental to either the morals or health of the child, she is entitled to the custody of the child. It does not appear from the record in this case that any of these conditions can be alleged. Aside from the lapse from virtue which resulted in the birth of the child, the record discloses nothing which can be viewed as affecting adversely the morality of the plaintiff in error. The child has been in her custody since December 2, 1919. It may, perhaps, be inferred that the original petitioners are not at the present time so anxious as formerly to contest the mother's claim. This might be inferred from the fact that no brief or argument has been filed in opposition to the claims of the plaintiff in error.

It might be urged that the plaintiff in error has forfeited her right to the custody of the child by her abandonment of him. It is true that she once signed a consent to the adoption of the child by petitioners. This consent was not acted upon by them. Had they prosecuted adoption proceedings to a finality, as they might have done, under the consent, the mother would have been foreclosed from asserting any right to the custody of the child, but until this consent was acted upon and the conditions of the parties thereby changed, the law gives the mother the right to change her mind.

The decree of the Superior Court is reversed and the cause remanded with directions to discharge the respondents and to award the custody of the child to the plaintiff in error.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

Unless it appears that the mother is unfit to have the care and custody of her child, or that she is financially unable to properly care for the child, or that her environment is such as to be detrimental to either the moral or health of the child, she is entitled to the custody of the child. It does not appear from the report in this case that any of these conditions can be alleged. Aside from the lapse from virtue which resulted in the birth of the child, the record discloses nothing which can be viewed as affecting adversely the morality of the plaintiff in error. The child has been in her custody since December 8, 1919. It may, perhaps, be inferred that the original petitioners are not at the present time as anxious as formerly to contest the mother's claim. This might be inferred from the fact that no brief or argument has been filed in opposition to the claims of the plaintiff in error.

It might be urged that the plaintiff in error has forfeited her right to the custody of the child by her abandonment of him. It is true that she once signed a consent to the adoption of the child by petitioners. This consent was not acted upon by them. Had they presented adoption proceedings to a finality, as they might have done, under the consent, the mother would have been foreclosed from asserting any right to the custody of the child. But until this consent was acted upon and the conditions of the petition thereby changed, the law gives the mother the right to change her mind.

The decree of the Superior Court is reversed and the cause remanded with directions to discharge the respondents and to award the custody of the child to the plaintiff in error.

REVERSED AND REMANDED.

Bradley, P. J., and Barnes, J., concur.

286 - 26058

E. J. BENNING,
Appellee,

vs.

D. J. MAHER,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I. A. 332

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in an action of forcible detainer finding appellant guilty of unlawfully withholding from appellee possession of the premises described in the complaint.

The action is statutory and can be maintained only upon the conditions specified in the statute and pursuant to its requirements. Fitzgerald v. Quinn, 165 Ill. 354. The record in this case fails to show that the suit is based upon any of the grounds specified in the statute.

Forcible entry and detainer being a possessory action, it is essential for the plaintiff to prove that the defendant is in possession of the premises in question. Preston v. Davis, 112 Ill. App. 636. This was not done in the case at bar.

For these reasons the judgment of the Municipal Court is reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

314 - 26086

HERBERT JAMES OKE,
Appellant,

vs.

JOHN SPIVAK et al., doing
business as Spivak, Stein
& Citron,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

222 I.A. 632

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Suit was brought against John Spivak, Manuel Stein, David Citron and George Citron, doing business as Spivak, Stein & Citron, and each of them, to recover damages for personal injuries suffered by plaintiff through the alleged negligence of defendants. The declaration alleges in substance that on January 23, 1911, the defendants and each of them operated, controlled and owned a certain barn near the rear of 4732 and 4734 Indiana avenue, in the City of Chicago, which the defendants allowed the father of plaintiff to use for the purpose of housing a wagon and horses belonging to plaintiff's father, and that the plaintiff was injured by the falling of a certain door, which had been improperly hung and fastened, and by reason thereof plaintiff sustained sundry serious injuries.

A plea of the general issue was filed and four special pleas, three of which alleged in substance that the defendants did not own, operate or control the barn in question and had not leased the same to the father of plaintiff or permitted him to use the barn; that they did not operate, control and own the barn in question while doing business as Spivak, Stein & Citron, and the fourth special plea set up the statute of limitations. No replications or other pleadings were filed.

The case proceeded to trial and before all the testimony

Mr. JUSTICE BOURNE, DELIVERING THE OPINION OF THE COURT:

Suit was brought against John Spivak, Samuel Stein, David Citron and George Citron, doing business as Spivak, Stein & Citron, and each of them, to recover damages for personal injuries suffered by plaintiff through the alleged negligence of defendants. The defendants pleaded in mitigation that on January 24, 1931, the defendants had ceased to exist as a partnership and owned a private beer case the case of 1738 AT34 Madison avenue, in the City of Chicago, which the defendants allowed the father of plaintiff to use for the purpose of housing a wagon and horses belonging to plaintiff's father, and that the plaintiff was injured by the falling of a metallic door, which had been improperly hung and fastened, due to reasons thereof plaintiff sustained grave serious injuries.

A plea of the general issue was filed and four special pleas, three of which alleged in substance that the defendants did not own, operate or control the beer in question and had not loaned the same to the father of plaintiff or permitted him to use the beer; that they did not operate, control and own the beer in question while doing business as Spivak, Stein & Citron, and the fourth special plea set up the statute of limitations. No replications to other pleadings were filed.

of the plaintiff had been concluded it appeared that the barn in question was operated by a corporation known as Spivak, Stein & Citron on the date mentioned in the declaration. Thereupon plaintiff, by his counsel, moved to amend the declaration and all his pleadings by striking out the names John Spivak, Manuel Stein, David Citron and George Citron wherever they appeared and to make the name of the defendant read, "Spivak, Stein & Citron, a corporation." This motion was denied by the court, and in connection with his ruling the trial judge stated that he denied the motion upon the ground that he had no right or jurisdiction to permit such an amendment after the statute of limitations had run, suit having been brought against the co-partnership and not against the corporation. The court thereupon instructed the jury to find defendants not guilty, and a verdict being returned in conformity with said instruction, judgment was entered upon the verdict, from which the plaintiff appeals.

The only ground urged by the appellant for a reversal of the judgment seems to be based upon the proposition that where a party is sued by a wrong name but served, he must take advantage by plea in abatement, and that the court erred in denying the motion of plaintiff to substitute the corporation as a defendant, and in instructing the jury to find for the defendants.

We cannot agree with this contention. The corporation in question is a separate and distinct entity and cannot be brought into the suit merely by the substitution of its name in place of the names of the original defendants. It is a new party to the action and can be brought into court solely by summons, which would be the commencement of a new suit so far as the new party is concerned. United States Insurance Company v. Ludwig, 108 Ill. 519. In other words, this was not a case of misnomer, but an effort to bring into court a new defendant. The right

of the plaintiff had been concluded. It appeared that the bank in question was operated by a corporation known as Spivak, Stein & Citron on the date mentioned in the declaration. Thereupon plaintiff, by his counsel, moved to amend the declaration and all his pleadings by striking out the names John Spivak, Manuel Stein, David Citron and George Citron wherever they appeared and to make the name of the defendant read, "Spivak, Stein & Citron, a corporation." This motion was denied by the court, and in connection with his ruling the trial judge stated that he denied the motion upon the ground that he had no right or jurisdiction to permit such an amendment after the statute of limitations had run, suit having been brought against the co-partnership and not against the corporation. The court thereupon instructed the jury to find defendants not guilty, and a verdict being returned in conformity with said instruction, judgment was entered upon the verdict, from which the plaintiff appeals.

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We cannot agree with this contention. The corporation in question is a separate and distinct entity and cannot be brought into the suit merely by the substitution of its name in place of the names of the original defendants. It is a new party to the action and can be brought into court solely by summons, which would be the commencement of a new suit as far as the new party is concerned. United States Insurance Company v. Bright, 108 Ill. 219. In other words, this was not a case of misnomer, but an effort to drive into court a new defendant. The rights

party was not brought into court by the original summons. As in the case of Proctor v. Wells Brothers Company of New York, 181 Ill. App. 468, it is urged that the corporation was really a party to the action because it was the party that plaintiff intended to sue, and the court then said: "If such a matter were determined by intent alone, without reference to any other circumstances or facts, the bar of the statute might always be easily avoided whenever the wrong defendant is sued, no matter what the lapse of time." It is doubtless true that appellant intended to sue the actual owner of the barn, but the fact remains that he did not do so and served another party. The parties served with process, by their special pleas, gave notice to plaintiff that he had sued the wrong party. As stated by the court in Proctor v. Wells Brothers Company, supra:

> "One of the express purposes of enforcing the rule in this state requiring a plea or notice that one is 'not the owner or in possession or operation of the property or instrumentalities which have caused the injury,' is that it may give the plaintiff 'an opportunity of making investigation, and if he ascertains that he has sued the wrong party he may before the statute of limitations becomes a defense, bring his suit against the party that is, in fact, liable.' (citing authority) But plaintiff persisted in trying the issue instead of profiting by the notice, and when he discovered his mistake the period of the statute had run."

We are of the opinion that the ruling of the trial court was correct in denying the motion for leave to amend the declaration and in instructing the jury to return a verdict for defendants. No other ground for a reversal being brought to the attention of the court, the judgment of the Superior Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

> "One of the express purposes of enforcing the rule in this state requiring a plea or notice that one is not the owner or in possession or operation of the property or instrumentalities which have caused the injury,' is that it may give the plaintiff 'an opportunity of making investigation, and if he ascertains that he has sued the wrong party he may before the statute of limitations becomes a defense, bring his suit against the party that is, in fact, liable.' (citing authority) Not plaintiff persisted in trying the issue instead of profiting by the notice, and when he discovered his mistake the period of the statute had run."

We are of the opinion that the ruling of the trial court was correct in denying the motion for leave to amend the declaration and in instructing the jury to return a verdict for defendants. No other grounds for a reversal being brought to the attention of the court, the judgment of the Superior Court is affirmed.

Judgment.

Gradley, P. J., and Jenkins, J., concur.

323 - 26095

HARRY SIEGEL,
Appellee,

vs.

C. B. SHANE COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 633

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The plaintiff's statement of claim alleged in substance that he was employed by the defendant as foreman in its raincoat shop during the years 1916, 1917 and a part of 1918; that at the beginning of each of the years 1916 and 1917 it was agreed between the parties that plaintiff should receive from defendant a sum of money equal to five per cent of defendant's profits from the sale of raincoats during each of said years, in addition to his agreed salary, and that at the beginning of 1918 it was agreed that plaintiff should receive the sum of $500 instead of the five per cent stipulated for the previous years, and in the event he should leave the employ of the defendant before the end of the year he should receive his pro rata share. It was also alleged that five per cent of the profits during the year 1916 was $500 and during the year 1917 was $700; that he received on account thereof $742.82, leaving a balance due for the two years of $457.18; that plaintiff left the employ of defendant on March 23, 1918, and that there was then due him for his pro rata share of profits for that year the sum of $115.

The defendant's affidavit of merits denied these agreements and denied that the amount of the alleged bonuses for the years 1916 and 1917 were $500 and $700 respectively, and denied the making of the agreement for the year 1918 and alleged that the amounts paid by plaintiff specified in the statement of claim

The plaintiff's statement of claim alleges in substance that he was employed by the defendant as foreman in its tanhouse shop during the years 1916, 1917 and a part of 1918; that at the beginning of each of the years 1916 and 1917 it was agreed between the parties that plaintiff should receive from defendant a sum of money equal to five per cent of defendant's profits from the sale of manufactured tanning oils of that year, in addition to his agreed salary, and that at the beginning of 1918 it was agreed that plaintiff should receive the sum of $500 instead of the five per cent stipulated for the previous years, and in the event he should leave the employ of the defendant before the end of the year he should receive his pro rata share. It was also alleged that five per cent of the profits during the year 1916 was $800 and during the year 1917 was $900; that he received as instalment thereof $[illegible].83, leaving a balance due for the two years of $[illegible]; that plaintiff left the employ of defendant on March 3, 1918, and that there was then due him for his pro rata share of profits for that year the sum of $318.

The defendant's affidavit of merits denied these agreements and denied that the amounts of the alleged bonuses for the years 1916 and 1917 were $800 and $900 respectively, and denied the making of the agreement for the year 1918 and alleged that

were purely voluntary payments and were without consideration, which sums amounted in the aggregate to $792.82 instead of $742.82, as alleged in the statement of claim.

Plaintiff's claim was supported by his own testimony, which was corroborated to some extent by a statement of account, which he testified was delivered to him by defendant prior to his leaving the defendant's employ. This statement showed plaintiff credited with a bonus for the year 1916 of $500 and for the year 1917 of $700, and showed sundry charges against him for the two years in question amounting to $792.82, of which $400 was in cash and leaving a balance due of $407.18. The books of the company were also received in evidence, showing that five per cent of the profits of its raincoat profits for 1916 amounted to $553.92 and for the year 1917 amounted to $493.41, making in the aggregate $1047.33, and that plaintiff had drawn in merchandise and cash for those two years $792.82, leaving a balance due plaintiff on the basis of the books kept by the defendant of $254.51.

The jury brought in a verdict in favor of the plaintiff and assessed the plaintiff's damages at the sum of $407.18, which seems to have been based upon the statement above mentioned given by the defendant to the plaintiff in March, 1918. Subsequently, upon the hearing of the motion for a new trial, plaintiff remitted the sum of $152.67, which left the amount of the verdict at $254.51, thereby indicating that plaintiff preferred to rely upon the amount shown by the books of the company rather than upon the statement which he testified had been furnished by defendant in March, 1918. Judgment was entered upon the verdict for the sum of $254.51 and costs, from which an appeal was taken.

The only ground for a reversal which is brought to our attention by the brief of appellant is based upon the theory that the agreements were not made in the years 1916 and 1917, as

were purely voluntary payments and were without consideration, which sums amounted in the aggregate to $[illegible].83 instead of $[illegible].83, as alleged in the statement of claim.

Plaintiff's claim was supported by his own testimony, which was corroborated to some extent by a statement of account, which he testified was delivered to him by defendant prior to his leaving the defendant's employ. This statement showed plaintiff credited with a bonus for the year 1918 of $[illegible] and for the year 1919 of $[illegible], and showed sundry charges against him for the two years in question amounting to $[illegible].83, of which $400 was in cash and leaving a balance due of $[illegible].18. The books of the company were also received in evidence, showing that five per cent of the profits of its business profits for 1918 amounted to $[illegible].32 and for the year 1919 amounted to $[illegible].44, making in the aggregate $[illegible].32, and that plaintiff had drawn in merchandise and cash for those two years $[illegible].83, leaving a balance due plaintiff on the basis of the books kept by the defendant of $[illegible].

The jury brought in a verdict in favor of the plaintiff and assessed the plaintiff's damages at the sum of $[illegible].18, which seems to have been based upon the statement above mentioned given by the defendant to the plaintiff in March, 1918. Subsequently, upon the hearing of the motion for a new trial, plaintiff remitted the sum of $[illegible].07, which left the amount of the verdict at $[illegible].18, thereby indicating that plaintiff relied in only upon the amount shown by the books of the company rather than upon the statement which he testified had been furnished by defendant in March, 1918. Judgment was entered upon the verdict for the sum of $[illegible].18 and costs, from which an appeal was taken.

The only ground for a reversal which is brought to our

claimed by plaintiff, and that the items constituting the amount of $792.82 were purely voluntary gifts by the defendant to the plaintiff and without consideration.

We consider that all payments made to plaintiff were in the nature of salary or wages in consideration of services rendered and to be rendered by the plaintiff. The verdict of the jury upon all controverted questions of fact involved in the case was conclusive. The jury are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. This proposition requires no citation of authorities in support of it. In our opinion the judgment was fully sustained by the evidence.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

claimed by plaintiff, and that the items constituting the amount of $172.22 were purely voluntary gifts by the defendant to the plaintiff and without consideration.

We consider that all payments made to plaintiff were in the nature of salary or wages in consideration of services rendered and to be rendered by the plaintiff. The verdict of the jury upon all controverted questions of fact involved in the case was conclusive. The jury was the sole judges of the credibility of the witnesses and the weight to be given to their testimony. This proposition requires no citation of authorities in support of it. In our opinion the judgment was fully sustained by the evidence.

The judgment of the Municipal Court is affirmed.

JUDGMENT.

Dunning, P. J., and Barron, J., concur.

332 - 26104

CHARLES H. ALDRICH, for the use of EDWARD E. NAUGLE,
Appellant,

vs.

FORT DEARBORN NATIONAL BANK, a corporation, Garnishee, and MINNIE H. NAUGLE, Guardian, Intervening Petitioner,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 633

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Judgment was rendered in favor of Edward E. Naugle and against Charles H. Aldrich on July 28, 1919, for $828.31 and costs, and execution issued. Demand being made upon Aldrich under the execution, he filed a schedule of his personal property in order to claim his exemptions and the writ was thereupon returned "no part satisfied." The Fort Dearborn National Bank was summoned as garnishee and in its answer, filed on August 28, 1919, stated that Aldrich had on deposit at the time of the serving of the writ $703; that it was informed that $555 of that amount was a trust fund which had been collected by Aldrich for Minnie H. Naugle. Leave was granted to the latter to interplead, and on September 3, 1919, she filed her petition claiming that on July 12th and 28th Aldrich collected the respective sums of $280 and $275, the first being interest on Liberty bonds and the other interest on certain mortgages, all being the property of an estate of which she is guardian. These sums on the dates mentioned were deposited by Aldrich in his personal bank account, and immediately thereafter he drew checks on the same payable to the intervenor for the respective sums. These checks were received by Mrs. Naugle on July 14 and July 30, 1919, respectively, and were presented to

MR. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

Judgment was rendered in favor of Edward E. Maugis and against Charles E. Aldrich on July 26, 1917, for $[illegible] and costs, and execution issued. Demand being made upon Aldrich under the execution, he filed a schedule of his personal property in order to claim his exemptions and the writ was returned "no part satisfied." The First Dearborn National Bank was summoned as garnishee and in its answer, filed on August 28, 1919, stated that Aldrich had on deposit at the time of the serving of the writ $700; that it was informed that $[illegible] of that amount was a trust fund which had been collected by Aldrich for Minnie E. Maugis, leave was granted to the latter to intervene, and on September 9, 1919, she filed her petition claiming that on July 12th and 28th Aldrich collected the respective sums of $200 and $[illegible], the first being interest on Liberty bonds and the other interest on certain mortgages, all being the property of an estate of which she is guardian. These sums on the dates mentioned were deposited by Aldrich in his personal bank account, and immediately thereafter he drew checks on the same payable to the intervenor for the respective sums. These checks were received by Mrs. Maugis on July 14 and July 30, 1919, respectively, and were presented to

the bank for payment on August 30, 1919, whereupon payment was refused because of the garnishment proceedings. The petitioner claimed to be entitled to the sums represented by said checks as against all other persons. The court found the issues in favor of the intervening claimant for the sum of $555, and rendered judgment on the finding, from which Edward T. Naugle, the plaintiff in the original proceeding, appeals.

It is contended by the appellant that he is entitled to the funds under the garnishment proceeding by reason of the fact that the relations between Mrs. Naugle and Aldrich were those of debtor and creditor; that no trust was created; that even if there was a trust, the fund had been converted into other property and could not be identified, the money having been mixed and confounded with other money in the account of Aldrich and by the bank in a general mass of property of the same description.

It is also contended by appellant that the intervening claimant gained no rights as against him by reason of the check, because checks do not operate as an assignment of any part of the funds to the credit of the drawer under the provisions of Sec. 188 of the Negotiable Instruments Act.

It is for the court to determine whether the plaintiff or the intervening claimant is entitled to the sum of $555. The questions raised by appellant's brief do not seem pertinent to the decision. The provisions of the Negotiable Instruments Act are correctly stated by appellant, and it is now the settled law of this state that a check does not of itself operate as an assignment of any part of the funds in bank to the credit of the drawer. These provisions, however, relate solely to the obligation of the banker to the depositor and are not material to the determination of the present controversy. It has been held by this

the bank for payment on August 30, 1919, whereupon payment was refused because of the garnishment proceedings. The petitioner claimed to be entitled to the sums represented by said checks as against all other persons. The court found the issues in favor of the interpleading claimant for the sum of $888, and rendered judgment on the finding, from which Edward S. Bangle, the plaintiff in the original proceeding, appeals.

It is contended by the appellant that he is entitled to the funds under the garnishment proceeding by reason of the fact that the relations between Mrs. Bangle and Aldrich were those of debtor and creditor; that no trust was created; that even if there was a trust, the fund had been converted into other property and could not be identified, the money having been mixed and commingled with other money in the account of Aldrich and by the bank in a general mass of property of the same description.

It is also contended by appellant that the interpleading claimant gained no rights as against him by reason of the check, because checks do not operate as an assignment of any part of the funds to the credit of the drawer under the provisions of the Uniform Negotiable Instruments Act.

It is for the court to determine whether the plaintiff or the interpleading claimant is entitled to the sum of $888. The questions raised by appellant's brief do not seem pertinent to the decision. The provisions of the Negotiable Instruments Act are correctly stated by appellant, and it is now the settled law of this state that a check does not of itself operate as an assignment of any part of the funds in bank in the credit of the drawer. These provisions, however, relate solely to the obligation of the banker to the depositor and are not material to the determination of the present controversy. It has been held by this

court that courts of law will protect an equitable interest in a garnishment proceeding as against the rights of a creditor. Inderrieden Co. v. Bank of Newberg, 176 Ill. App. 304.

It is also stated by this court in Supreme Sitting Order of the Iron Hall v. Grigsby, 78 Ill. App. 305, as follows: "It is a well established doctrine in garnishment proceedings that the garnisheeing creditor will have no greater right to recover of the party garnisheed than the debtor in whose name the suit is conducted," citing authorities. This doctrine has been repeatedly sustained by the courts of this state and is directly applicable to the case at bar. In other words, the garnisheeing creditor could have no better claim against the intervening claimant than that of Charles H. Aldrich, the original debtor. This question was directly passed upon by this court in the case of Byers v. Illinois Trust & Savings Bank, 146 Ill. App. 594, in which the garnisheeing creditor sought to obtain judgment against the bank on a claim against a wife who had funds belonging to her husband on deposit in her name. The court said:

> "A garnishee proceeding, although brought on the law side of the court, is a statutory one, and in its nature equitable. Rules of an equitable nature obtain in arriving at a conclusion upon which the decision rests. It is quite apparent that Wright, who sues out the writ of garnishment in virtue of his judgment against the widow Creak, now the wife of James C. Byers, can have no greater title to the money sought to be garnisheed than would Wright's judgment debtor."

The application of the provision of the Negotiable Instruments Act, upon which appellant relies, was considered in the case of Farrington v. Fleming Commission Co., 47 L. R. A., N. S. 742, in which it was claimed that the holder of a check had no equitable right in the deposit on which the check was drawn, the contention being based upon Sec. 188 of the Negotiable Instruments Act. The court points out that under this provision the depositor becomes the creditor of the bank for the principal

court that source of law will proceed on equitable interest in a garnishment proceeding as against the rights of a creditor. Interstate Ins. Co. v. Jack of Hearts, 174 Cal. App. 164.

It is also stated by this court in Western Milling Co. of the Iron Hall v. Gingery, 78 Ill. App. 308, as follows: "It is a well established doctrine in garnishment proceedings that the garnishee creditor will have no greater right to recover of the party garnished than the debtor in whose hands the suit is commenced," citing authorities. This doctrine has been repeatedly sustained by the courts of this state and is directly applicable to the case at bar. In other words, the garnishee creditor could have no better claim against the intervening claimant than that of Jerline E. Lincoln, the original debtor. This question was directly passed upon by this court in the case of Byers v. Illinois Trust & Savings Bank, 148 Ill. App. 414, in which the garnishee creditor sought to obtain judgment against the bank on a claim against a wife who had funds belonging to her husband on deposit in her name. The court said:

> "A garnishee proceeding, although brought on the law side of the court, is a statutory one, and in its nature equitable. Title of an attachment creditor arises in arresting as a garnishee upon whom the attachment rests. It is quite apparent that Wright, who sues out the writ of garnishment in virtue of his judgment against the maker thereof, now the wife of James C. Byers, can have no greater title to the money sought to be garnished than would Wright's judgment debtor."

The application of the principles of the Negotiable Instruments Act, upon which appellant relies, was considered in the case of Harrington v. Illinois Commission Co., 82 Ill. App. 3d, 746. In which it was claimed that the maker of a check had no equitable right in the proceeds on which the check was drawn, the consideration being based upon sec. 190 of the Negotiable Instruments Act. The court pointed out that under this provision the depositor becomes the creditor of the bank for the principal

sum, and that if a check operated as an assignment of the fund, the effect would be that a right of action for the same money in the hands of the bank might accrue to two persons upon one promise at the same time under the law as it existed in some jurisdictions prior to the Negotiable Instruments Act. The court said: "This plaintiff is not claiming under the negotiable instrument act. The effect of service upon the garnishee is to impound the funds in the hands of the garnishee. The bank holding the deposit is not directly interested in this litigation. Its duty as garnishee is to pay the money to the party having the better right to it, as determined by the court." The court then holds that the owner of the check has a better right to the deposit than the garnisheeing company, because the latter could obtain no better right to the funds than that of the original debtor. In other words, the equitable right of the holder of the check as against the garnisheeing creditor is recognized.

We are of the opinion that under the facts set forth in the record, the rights of the intervening claimant are entitled to the protection of the court as against the claim of the creditor.

It is also urged, in support of the judgment of the Municipal Court, that the latter court did not acquire jurisdiction by reason of the fact that the execution in the original proceeding was not offered in evidence. This seems to be sustained by adequate authority. It was held in La-Salle Opera House Company v. The La-Salle Amusement Company, 285 Ill. 198, as follows:

> "The execution issued and its return are not part of the common law record in the original proceeding, but they, together with the affidavit for the summons against the garnishee, are the means of acquiring jurisdiction in the garnishee proceedings, and are therefore a part of the record, which must be shown to sustain a judgment against the garnishee. The absence of them from the record is fatal to the judgment."

For the reasons above indicated, the judgment of the Municipal Court is affirmed.

Gridley, P. J., and Barnes, J., concur. AFFIRMED.

case, and that if a check operated as an assignment of the fund, the effect would be that a right of action for the same money in the hands of the bank might accrue to two persons upon one premise on the same time under the law as it existed in some jurisdictions prior to the Negotiable Instruments Act. The court said: "This plaintiff is not claiming under the negotiable instrument act. The effect of service upon the garnishee is to impound the funds in the hands of the garnishee. The bank holding the deposit is not directly interested in this litigation. Its duty is garnishee is to pay the money to the party having the better right to it, as determined by the court." The court then holds that the owner of the check has a better right to the funds than the garnishee trustee, because the latter would obtain no better right to the funds than that of the original debtor. In other words, the equitable right of the holder of the check is superior to the garnishee creditor.

In one of the opinion that under the facts set forth in the record, the rights of the intervening claimant are entitled to the protection of the court as against the claim of the creditor.

It is also noted, in support of the judgment of the municipal court, that the latter court did not rendered judgment by reason of the fact that the evidence in the criminal proceeding was not offered in evidence. This seems to be sustained by authority. It was held in Lincoln Trust Company v. The Lincoln Insurance Company, 98 Ill. App. 50, as follows:

> "The exemption issued and its return are not part of the common law record in the criminal proceeding, but they, together with the affidavit for the garnishment against the garnishee, are the means of acquiring jurisdiction in the garnishee proceeding, and are therefore a part of the record, of too much to enable a judgment against the garnishee. The absence of them from the record is fatal to the judgment."

For the reasons above indicated, the judgment of the municipal court is affirmed.

342 - 26114

IN THE MATTER OF THE ESTATE
OF WILLIAM J. KELLEY, Jr.,
deceased,

Appellee,

vs.

WILLIAM J. KELLEY,

Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

222 I.A. 633

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

December 4, 1918, appellant filed his claim in the Probate Court of Cook County against the estate of William J. Kelley, Jr., for the sum of $3853.51, which was allowed by the Probate Court on March 27, 1919. An appeal was taken to the Circuit Court, where the matter was heard by the court without a jury. The trial in the Circuit Court resulted in a judgment against the claimant, from which an appeal has been taken to this court.

The appellant, who was the claimant in the court below, is the father of the decedent and the administrator of his estate. The claim consists of an item of $2900 loaned by the claimant to the decedent in his lifetime and used by him in the purchase of a membership on the Board of Trade of Chicago, and an item of $650, also loaned by the claimant to decedent in his lifetime, and used by the latter in furnishing an apartment for himself and his family. Interest at six per cent on both sums amounting to $303.61 is also charged.

It seems to be undisputed that these loans were made as above stated; no evidence to the contrary is shown by the record. The testimony of the claimant in that respect is amply corroborated by other oral and documentary proof. The only

testimony which was offered against the allowance of the claim seems to have been certain alleged declarations of the claimant against his own interest. One of these declarations is said to have been made on the evening of his son's wedding, at which time the financial condition of the bridegroom was under discussion, and claimant is said to have stated in substance that his son did not owe a dollar to anyone in the world and owned his membership in the Board of Trade. The other declaration, to the same effect, is said to have been made on the evening of the day on which his son died. Claimant denies that he ever made either of the statements.

It is urged by appellant that these declarations, even if made, do not constitute an estoppel and cannot be urged as such against the allowance of the claim. Appellee seems to admit that the declarations in question do not constitute an estoppel. At any rate, he denies that he invoked the "protection of an estoppel" in the trial court and disclaims any intention of seeking such protection in thiscourt. We therefore deem it unnecessary to discuss the question of the authorities cited with reference thereto.

Appellant also insists that the Circuit Court was without jurisdiction to hear the case owing to certain informalities and irregularities alleged to have occurred in taking the appeal from the Probate Court. No objection to its jurisdiction seems to have been made in the Circuit Court. The parties joined in trying the case in the Circuit Court. This was done with the express or tacit agreement that the Circuit Court had jurisdiction of the subject-matter and the parties. We are of the opinion that it is now too late to object to the jurisdiction of the court. The Supreme Court of this state in Grier v. Cable, 159 Ill. 32, which was a case similar to the case at bar, said:

testimony which was offered against the allowance of the claim seems to have been certain alleged declarations of the claimant against his own interest. One of these declarations is said to have been made on the evening of his son's wedding, at which also the financial circumstances of the [illegible] and claimant is said to have stated in substance that he was not one a dollar to anyone in the world and owed his comfortably in the Land of Canada. The other declaration, in the same effect, is said to have been made on the evening of the day on which his son died. Claimant denies that he ever made either of the statements.

It is argued by appellant that these declarations, even if made, do not constitute an estoppel and cannot be urged as evidence against the allowance of the claim. Counsel seems to admit that the declarations in question do not constitute an estoppel. At any rate, he denies that he invoked the "protection of an estoppel" in the trial court and disclaims any intention of asserting such protection in this court. It therefore does it unnecessary to discuss the question of the authorities cited with reference thereto.

Appellant also argues that the Circuit Court was without jurisdiction to hear the case owing to certain informalities and irregularities alleged to have occurred in taking the appeal from the Probate Court. No objection to the jurisdiction seems to have been made in the Circuit Court. The parties joined in trying the case in the Circuit Court. This was done with the assent or tacit acquiescence, that the Circuit Court had jurisdiction of the subject matter and the parties. At no time of the opinion that it is too late to object to the jurisdiction of the court. The supreme Court of this state in Ingle v. Jones, 172 Ill. 63, cited on a like matter, to the same effect, said:

> "While consent cannot give jurisdiction of a subject-matter to a court not vested by law with such jurisdiction, yet, where the parties appear before a court of competent jurisdiction and submit to it their controversies for adjudication, the court acquires full power to try the case and render judgment, wholly independently of the character of the original process by which the case is nominally brought within its jurisdiction."

The only question to be determined by the court is, whether or not decedent's estate is actually indebted to the amount claimed. As already remarked, we find no evidence in the record to the contrary. We do not consider that the declarations and admissions of the claimant, even if made, as alleged, were conclusive against the claimant. If made, they were merely parts of general conversations and were not intended to, and, as a matter of fact, did not, affect the legal rights of anyone who heard them. As was said by the Supreme Court in Halloran v. Halloran, 137 Ill. 112:

> "While an acknowledgment or confession by a party against his interest may always be given in evidence against him, it may or may not be conclusive. If the opposite party relying upon the admission and acting upon it has altered his position, the party making the admission will not be permitted afterward to retract it."

We are of the opinion that the decision of the Probate Court in allowing the claim was correct. The judgment of the Circuit Court is reversed and judgment entered here in favor of the claimant, William J. Kelley, and against the estate for the amount of the claim, $3853.61, with interest at five per cent per year from March 27, 1919, the date of its allowance here and below, and costs payable in due course of administration.

JUDGMENT REVERSED AND JUDGMENT HERE.

Gridley, P. J., and Barnes, J., concur.

"While courts cannot give jurisdiction of a multi-million to a court not vested by law with such jurisdiction, yet, where the parties cannot before a court of competent jurisdiction and submit to it their controversies for adjudication, the court requires full power to try the case and render judgment, until inconsistent of the character of the original process by which the case is rightfully brought within its jurisdiction."

The only question to be determined by the court is, whether or not decedent's estate is rationally indebted to the amount claimed. As already remarked, we find no evidence in the record to the contrary. We do not consider that the declarations and admissions of the claimant, even if made, as alleged, were conclusive against the claimant. If made, they were merely parts of general conversations and were not intended to, and, as a matter of fact, did not, affect the legal rights of anyone who heard them. As was said by the Supreme Court in Hallaran v. Hallaran, 137 Ill. 132:

"While an admission or confession by a party against his interest may always be given in evidence against him, it may or may not be conclusive. If the opposite party relying upon the admission and acting upon it has altered his position, the party making the admission will not be permitted afterward to retract it."

We are of the opinion that the decision of the Probate Court in allowing the claim was correct. The judgment of the Circuit Court is reversed and judgment entered here in favor of the claimant, William T. Bailey, and against the public for the amount of the claim, $5883.61, with interest at five per cent per year from March 8th, 1919, the date of the allowance and order probate in the Probate of administrator.

DOCKET NO. 17,[illegible] AGO NUMBER [illegible]

OATHAY, J. D., [illegible] v. [illegible] et al.

here and below

58 - 26181

C. H. KELLEY,
Plaintiff in Error,

vs.

STOVER MANUFACTURING AND ENGINE COMPANY, a corporation,
Defendant in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

222 I.A. 633

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Action was brought in the Municipal Court to recover damages for the breach of an express warranty in a contract of sale of two engines. The parties will be designated herein respectively as plaintiff and defendant.

Plaintiff's amended statement of claim avers that on September 28, 1916, he ordered from the defendant, doing business at Freeport, Illinois, two No. 150 horsepower throttled governor kerosene engines for the sum of $721.80 each, amounting in the aggregate to $1443.60; that the order was accepted and on December 16, 1916, defendant shipped to plaintiff two engines purporting to be of the character described, which were received by plaintiff and installed by him at Hinsdale, Montana, in a proper and workmanlike manner, in accordance with a contract which he had at that time (with Valley County, Montana) to furnish such engines, of which contract and obligation the defendants knew at the time of making the contract of sale; that the said engines were guaranteed to be well made, of good material, and with proper management to develop their rated horsepower, and alleges that these guarantees were not fulfilled; that the engines were not well made, of good material, and although properly managed did not develop the rated horsepower; that plaintiff notified defendant that the engines were unsatisfactory and there-

Action was brought in the Municipal Court to recover damages for the breach of an express warranty in a contract of sale of two engines. The parties will be designated herein respectively as plaintiff and defendant.

Plaintiff's amended statement of claim avers that on September 26, 1916, he ordered from the defendant, doing business at Freeport, Illinois, two No. 1BC horsepower Uncolled governor kerosene engines for the sum of $723.50 each, amounting in the aggregate to $1443.00; that the order was accepted and on December 16, 1916, defendant shipped to plaintiff two engines purported to be of the description mentioned, which were received by plaintiff and installed by him at Kinsella, Montana, in a proper and workmanlike manner, in accordance with a contract which he had at that time (with Valley County, Montana) in furnish such engines, of which contract and obligation the defendants knew at the time of making the contract of sale; that the said engines were guaranteed to be well made, of good material, and with proper management to develop their rated horsepower, and allegen that these guarantees were not fulfilled; that the engines were not well made, of good material, and although properly managed did not develop the rated horsepower; that plaintiff notified defendant that the engines were unsatisfactory and there-

after defendant undertook and endeavored to correct the faults in the engines but did not succeed in so doing; that thereafter plaintiff notified defendant that the party with whom plaintiff had said contract (referring to his contract with Valley County, Montana), refused to accept the engines, and the plaintiff, in order to carry out said contract, was obliged to substitute new engines, which he had purchased and installed. An itemized statement of plaintiff's damages, amounting to $6326.90, was included in the statement of claim.

The original order was attached to the statement of claim, from which it appears that two engines of the type described were ordered on September 28, 1916, by plaintiff of the defendant, for the price above indicated, subject to conditions of the agreement and warranty printed on the back of the order. By the conditions printed on the back of the order it was agreed that the title to the goods shipped under the order should remain in the defendant and the goods be held at all times subject to its order until fully paid for in money; that the purchaser agreed to accept the goods on arrival, pay freight charges thereon and look to the transportation company for all losses occasioned by damages to or failure to deliver the goods shipped and that in the event of the purchaser's failure to comply with the conditions the purchase price shall become due immediately, and other provisions not involved herein. The warranty printed on the back of the order was as follows:

> "Stover Gas or Gasoline Engines are guaranteed to be well made, of good materials and with proper management will develop their rated horsepower. Stover engines are warranted for one year from date of purchase and any part which within that time proves defective will be replaced with a new part, free of charge, at our factory, providing part showing defect is returned to factory, charges prepaid."

Defendant's affidavit of merits, filed November 4, 1919, alleges in substance that the engines were sold under the contract in writing set forth in plaintiff's statement of claim and that the engines complied in every particular with each and all of the

after defendant stockton and endeavored to convert the Tractor in the engines but did not succeed in so doing; that thereupon plaintiff notified defendant Jack Lee Perry and Jack Lee Perry had said contract (referring to the contract with Valley County Tractors), refused to accept the engines, and the plaintiff, in order to carry out said contract, was obliged to substitute new engines, which he had purchased and installed. In itemized statement of plaintiff's damages, amounting to $8,320.00, was included in the statement of claim.

The original order was attached to the statement of claim, from which it appears that two engines of the type described were ordered on September 22, 1918, by plaintiff of the defendant, for the price above indicated, subject to conditions of the agreement and warranty printed on the back of the order. By the conditions printed on the back of the order it was agreed that the title to the goods shipped under the order should remain in the defendant and the goods be held at all times subject to the order until fully paid for in money; that the purchaser agreed to accept the goods on arrival, pay freight charges thereon and look to the manufacturer (engine) for all loss sustained by reason of failure to deliver the goods ordered and that in the event of the purchaser's failure to comply with the conditions the purchase price shall become due immediately, and other provisions not involved herein. The warranty printed on the back of the order was as follows:

> "Where one of reliable engines are guaranteed to be well made, of good materials and with proper management will develop their rated horsepower. Steam engines are guaranteed for one year from date of purchase and any part which within that time proves defective will be replaced with a new part, free of charge, at the factory, providing such missing part is returned to factory, charges prepaid."

Defendants affirmatively pleaded (Filed December 4, 1921), alleges in substance that the engines were sold under the contract in writing set forth in plaintiff's statement of claim, and that the engines operated in every particular with each and all of the

terms of the contract; that it is untrue that said engines when properly operated would not develop the rated horsepower, and denies that plaintiff has sustained damages as claimed by him. It also alleges that it had no notice of the damages claimed by plaintiff or of any claim, contract of resale or the purchase of other machinery, or any knowledge as to any contract made by plaintiff with the City of Hinsdale, Montana, or with any corporation or district.

The evidence in the case shows that the plaintiff was a resident of Montana, doing business for many years as a municipal contractor, and that the defendant was a corporation engaged in the business of manufacturing engines at Freeport, Illinois. Prior to the purchase of the engines in question, plaintiff had entered into a contract with the County of Valley, Montana, to install an electric light system at Hinsdale, Montana, and had obligated himself to furnish and erect two 25 horsepower engines to operate a 37½ K. V. A. generator. His attention had been attracted to the defendant's engines by catalogue, describing the same, in which the statement appeared that "These engines are specially designed for electric lighting purposes and other power uses."

September 28, 1916, plaintiff went to Freeport and interviewed Mr. G. H. Hildebrand, the sales manager of the defendant, upon the subject of purchasing engines. In the course of the interview plaintiff explained the nature of his business and his contract for the construction of an electric light plant and his obligation to furnish two 25 horsepower engines for operating a generator in connection therewith, and sought the advice of the manufacturer as to the kind of engine which should be purchased, and upon the recommendation of Mr. Hildebrand, placed the order above mentioned. The engines were shipped to Montana December 16, 1916, and received in January, 1917. Plaintiff paid the purchase price and the expenses of shipment in strict accordance with the

terms of the contract; that it is untrue that said engines when properly operated would not develop the rated horsepower, and denies that plaintiff has sustained damages as claimed by him. It also alleges that it had no notice of the damages claimed by plaintiff or of any claim, contract or resale of the purchase of other machinery, or any knowledge as to any contract made by plaintiff with the City of Kinsdale, Montana, or with any corporation or district.

The evidence in the case shows that the plaintiff was a resident of Montana, doing business for many years as a municipal contractor, and that the defendant was a corporation engaged in the business of manufacturing engines at Freeport, Illinois. Prior to the purchase of the engines in question, plaintiff had entered into a contract with the County of Valley, Montana, to install an electric light system at Kinsdale, Montana, and had obligated himself to furnish and erect two 35 horsepower engines to operate a 17½ K. V. A. generator. His attention had been attracted to the defendant's engines by catalogue, describing the same, in which the statement appeared that "these engines are especially designed for electric lighting purposes and other power uses."

September 28, 1916, plaintiff went to Freeport and interviewed Mr. G. E. Hildebrand, the sales manager of the defendant, upon the subject of purchasing engines. In the course of the interview plaintiff explained the nature of his business and his contract for the construction of an electric light plant and his obligation to furnish two 35 horsepower engines for operating a generator in connection therewith, and sought the advice of the manufacturer as to the kind of engine which should be purchased, and upon the recommendation of Mr. Hildebrand, placed the order above mentioned. The engines were shipped to Kinsdale October 16, 1916, and received in January, 1917. Plaintiff paid the purchase

terms of the purchase. Each engine had a plate upon it showing the manufacturer's name, the horsepower capacity specified as 25 and the speed specified as 225 revolutions per minute. The engines were installed and placed in operation in the month of March, 1917, and operated as directed, but after a few days the service was found unsatisfactory and the committee in charge of the improvement complained to plaintiff that the lights were dim and the engines did not have power to pull the load.

Plaintiff thereupon sent a telegram to defendant on March 22, 1917, to the effect that the engines were not working properly and requesting that an expert be sent at plaintiff's expense. This request was complied with and one Albert J. Miller was sent by defendant to inspect the engines and remedy the difficulties, if any. Miller arrived in Hinsdale on March 24, 1917. It appears from the record that he was a man of extensive experience, both in the factory and in the practical operation of engines; that he had made many installations for the defendant and inspected their engines, and that for more than four years his experience in testing the horsepower of engines had been active. Upon Miller's arrival at Hinsdale, Montana, he inspected the engines and worked with them, but was unable to increase their power. He made no complaint as to the condition in which he found the engines or the manner of installation. He worked upon the engines for several days and finally decided to make a brake test for the purpose of showing the plaintiff that the engines were developing their rated horsepower. This test was made on March 31, 1917. The improvement district sent Hugh J. Hughes, an experienced engineer, in charge of the electric light plant at Glasgow, Montana, to represent it at the test. The method employed is known as the Prony brake test, which appears from the record to be a standard and generally recognized method for determining the horsepower of

terms of the purchase. Each engine has a plate upon it showing the manufacturer's name, the horsepower capacity specified as 25 and the speed specified as 325 revolutions per minute. The engines were installed and placed in operation in the month of March, 1917, and operated as directed, but after a few days the service was found unsatisfactory and the committee in charge of the improvement complained to plaintiff that the lights were dim and the engines did not have power to pull the load.

Plaintiff thereupon sent a telegram to defendant on March 28, 1917, to the effect that the engines were not working properly and requesting that an expert be sent at plaintiff's expense. This request was complied with and one Albert F. Miller was sent by defendant to inspect the engines and remedy the difficulties, if any. Miller arrived in Hinsdale on March 31, 1917. It appears from the record that he was a man of extensive experience, both in the factory and in the practical operation of engines; that he had made many investigations for the defendant and inspected their engines, and that for more than four years his experience in testing the horsepower of engines had been active. When Miller arrived at Hinsdale, however, he inspected the engines and worked with them, but was unable to increase their power. He made no complaint as to the condition in which he found the engines or the manner of installation. He worked upon the engines for several days and finally decided to make a brake test for the purpose of showing the plaintiff that the engines were developing their rated horsepower. This test was made on March 31, 1917. The improvement district and Jack L. Hudson, an experienced engineer, in charge of the electric light plant at Hinsdale, Montana, to represent it at the test. The method employed is known as the Prony brake test, which appears from the record to be a standard and generally recognized method for determining the horsepower of

an engine and was the method used in testing the engines by the defendant in its factory at Freeport. It is unnecessary to describe in detail the apparatus employed for making the test or the formula used in computing the horsepower, but it is sufficient to say that the test was agreed upon by Miller and Hughes and carried out under their direction, the original purpose on the part of Miller being to determine whether or not the engines would develop 25 horsepower. Eight tests were made on March 31, 1917, under the direction of Miller, who selected the better of the two engines for the purpose of the test. Those present and participating in the tests were Miller, the expert sent by the defendant, Hughes, the expert representing the committee having the improvement in charge, Haugen, the city engineer, and Hatchford, the engineer who installed the engines in the plant for plaintiff. The tests seem to have been exhaustive and fairly conducted. Several hours were consumed in making them. In these tests it was found that the engines developed a horsepower capacity ranging from 18.7 to 33.6, as dtated by Hughes, and from 17.91 to 23.4, as stated by Miller. The number of revolutions per minute were from 180 to 212, but in each instance below the rated speed of 225 revolutions per minute. After the tests had been completed Miller sent a telegram to defendant concerning the engines and received a reply on April 2, 1917, directing him to return to Freeport. Upon his arrival there he reported to defendant, turning over to it several pages of memoranda as to the result of the tests.

The committee in charge of the improvement refused to accept the engines from the plaintiff, of which fact the plaintiff notified defendant. In reply, the defendant insisted that the committee would find the engines suitable for their business, asserting that these engines in a test at the factory in Freeport

developed 25 horsepower, but never asserted that the engines had developed that capacity at Hinsdale, Montana. The plaintiff thereafter purchased two 25 horsepower engines from Fairbanks Morse & Company for $2750, and installed them in August, 1917. The Stover engines were removed and sold by plaintiff , after giving notice to the defendant of his intention to so dispose of them.

The written contract of purchase and sale above specified is the only contract between the parties and the liabilities and rights of the parties must be determined and controlled by the construction of the contract, which is a question of law for the court. It is not disputed that the engines were ordered, shipped, received and paid for by the plaintiff as above stated. The result of the tests of the engines at Hinsdale, Montana, is not disputed. It is contended by plaintiff that the warranty was by its terms a continuing warranty for one year and that it applied to the engines at the place where they were to be used. Defendant contends that the engines purchased were of an established and well known type and were bought as such; that as a result there was no <u>implied warranty</u> that they were reasonably suited for the purpose for which they were purchased by plaintiff. It is a sufficient answer to defendant's contention to say that the suit is not brought upon an implied warranty. While there may have been sufficient ground for asserting that there was an implied warranty, under Clause 1, Section 15 of the Uniform Sales Act, yet that possible phase of the case is not under discussion. The plaintiff brought his suit for the violation of an express warranty, which is defined by section 12 of the Uniform Sales Act as follows:

developed 25 horsepower, but never asserted that the engines had developed that capacity at Kinsella, Montana. The plaintiff therefore produced two 25 horsepower engines from Kalispell across a common for 25 miles, and installed them in square, 1.25 The other engines were removed and sold by plaintiff , after giving notice to the defendant of his intention to do dispose of them.

The written contract of purchase and sale above specified is the only contract between the parties and the liabilities and rights of the parties must be determined and controlled by the construction of the contract, which is a question of law for the court. It is not disputed that the engines were ordered, shipped, received and paid for by the plaintiff as above stated. The result of the tests of the engines at Kinsella, Montana, is not disputed. It is contended by plaintiff that the warranty was by its terms a continuing warranty for one year and that it applied to the engines at the place where they were to be used. Defendant contends that the engines purchased were of an established and well known type and were bought on ready shop or stock. There are no implied warranty that they were reasonably suited for the purpose for which they were purchased by plaintiff. It is a sufficient answer to defendant's contention to say that the suit is not brought upon an implied warranty. While there may have been sufficient ground for asserting that there was an implied warranty, under Section 1, Section 12 of the Uniform Sales Act, yet that possible phase of the case is not again discussed. The liability brought on will be the violation of an express warranty, which is defined by section 12 of the Uniform Sales Act as follows:

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods nor any statement purporting to be a statement of the seller's opinion only shall be construed as warranty."

The warranty printed on the reverse side of the contract involved complies with the foregoing definition and is an express continuing warranty.

The defendant further contends that the engines in question were sold under a written contract to be delivered f.o.b. at Freeport, Illinois, and that the warranty applied at that date and place. In other words, the question to be determined as outlined by the contention of the parties, is whether or not the warranty set forth in the original contract relates to the goods at the time of their shipment from Freeport, Illinois, or was intended to apply to the engines when installed and used at Hinsdale, Montana. It is admitted by both parties that the construction of the contract is a matter to be determined by the court and that the intent of the parties must be gathered from the terms of the written contract and the circumstances connected with the making thereof.

The terms of the warranty have already been set forth and need not be repeated. The engines were warranted for a term of one year from the date of purchase - among other things to develop their rated capacity, which is admitted to be 25 horsepower. We understand by this that for the period of one year from the date of the purchase the engines, under proper management and with proper installation, would develop this capacity. If at any time during that period they failed to develop this capacity, then there would be a breach of the warranty. The tests taken at Hinsdale, Montana, under the direction of an expert engineer selected by defendant and sent there for the purpose of inspecting the engines indicate that within a few days after their installa-

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty, if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods nor any statement purporting to be a statement of the seller's opinion only shall be construed as warranty."

The warranty pleaded on the reverse side of the contract involved complies with the foregoing definition and is an express warranty.

The defendant further contends that the engines in question were sold under a written contract to be delivered f.o.b. at Freeport, Illinois, and that the warranty applied at that date and place. In other words, the question is to be determined as outlined by the contention of the parties, is whether or not the warranty set forth in the original contract relates to the goods at the time of their shipment from Freeport, Illinois, or was intended to apply to the engines when installed and used at Ottawa, Kansas. It is admitted by both parties that the construction of the contract is a matter to be determined by the court and that the intent of the parties must be gathered from the terms of the written contract and the circumstances connected with the making thereof.

The terms of the warranty have already been set forth and need not be repeated. The engines were warranted for a term of one year from the date of purchase - among other things to develop their rated capacity, which is admitted to be 15 horsepower. The contention in this case is that the period of one year from the date of the purchase the engines, under proper management and with proper installation, would develop this capacity. If at any time during that period they failed to develop that capacity, that there would be a breach of the warranty. The Court takes the Kansas, during the operation of an engine equipped with [illegible] the engines involved in this action. The case after hearing [illegible]

tion they did not develop the rated horsepower or speed. No question was raised by defendant as to the management of the engines or as to their method of installation or the use to which they were put. It is unreasonable to suppose that the terms of this warranty were fulfilled by a test at the factory of the maker in Freeport, Illinois, before shipment of the machines. If the warranty meant nothing further, then it was without value.

The court held as a matter of law that where machinery is sold for immediate delivery with a continuing warranty of performance for one year, the warranty applies to the place where the machinery is to be used, provided that the seller knows at the time the contract is made where it is to be used. This proposition is correct. There is no question but that the defendant knew at the time the contract of sale was made that the engines were to be used at Hinsdale, Montana, in an electric lighting plant.

Another proposition of law correctly held by the court is to the effect that where machinery is sold with a continuing warranty of performance for one year, with knowledge on the part of the seller at the time of the execution of the contract of sale, that such machinery is to be used by the purchaser in fulfillment of a contract which said purchaser has with a third party to supply such machinery, performing as warranted for use in a certain place, such warranty applies during the period named therein for performance at the place where such machinery is to be supplied and used. The court also correctly held that the warranty contained in the contract of sale in this case is a continuing warranty, and other legal propositions in conformity with plaintiff's theory of the case. The court also held as a fact in the case that the warranty of the defendant applied to the engines as of the date of their delivery on the cars at

lian they did not develop the rated horsepower or speed. No question was raised by defendant as to the management of the engines or as to their method of installation or the use to which they were put. It is unnecessary to suppose that the terms of this warranty were fulfilled by a test on the factory of the maker in Prospect, Illinois, before shipment of the machines. If the warranty meant nothing further, then it was without value.

The court held as a matter of law that where machinery is sold for immediate delivery with a continuing warranty of performance for one year, the warranty applies to the place where the machinery is to be used, provided that the seller knows at the time the contract is made where it is to be used. This proposition is entirely. There is no question but that the defendant knew at the time the contract of sale was made that the engines were to be used at Hinsdale, Montana, in an electric lighting plant.

Another proposition of law correctly held by the court is to the effect that where machinery is sold with a continuing warranty of performance for one year, with knowledge on the part of the seller at the time of the execution of the contract of sale, that such machinery is to be used by the purchaser in fulfillment of a contract which said purchaser has with a third party to supply such machinery, performing to warranted for use in a certain place, such warranty applies during the period named therein for performance at the place where such machinery is to be supplied and used. The court also correctly held that the warranty contained in the contract of sale in this case is a continuing warranty, and that legal presumptions in controversy with plaintiff's theory of the case. The court also held as a fact in the case that the warranty of the defendant applied to the engines as of the date of their delivery on the cars at

Freeport, Illinois, which finding of fact seems to us to be a legal conclusion, wholly inconsistent with the previous holdings.

We cannot agree with the conclusion of the trial court that the warranty of the defendant was limited only to the operation of the engines as of the date of their delivery on the cars at Freeport. We are unable to understand by what process of reasoning a continuing warranty for a period of one year can be fulfilled by a test of the operation of the engines at the commencement of the period. Such a construction of the contract leaves the fulfillment of the warranty wholly under the control of the seller. When the seller purchases goods to be used at a future time and place the warranty survives acceptance and payment for a reasonable time, which in this case was limited to one year, for the discovery of defects. The use of the engine must be that made by the purchaser. Minnesota Thresher Mfg. Co. v. Hanson, 54 N. W. 311; White Mfg. Co. v. De La Vergne M. M. Co. 84 N. Y. Supp. 192.

In a case arising under a contract, wherein the defendants guaranteed the perfect working of a heating apparatus which they had put into a building for three years from the date of the completion of said apparatus, without additional cost to the plaintiff, the court said, with reference to the guaranty:

> "As used in the contract, the words are plain and unambiguous, and bind the appellants to do just what such words imported, taken in their ordinary acceptation. * * * We find nothing in any other part of the contract that modifies the import of these words or that would authorize an attempt to restrain or change their meaning or effect." Davis v. Sexton, 35 Ill. App. 409.

We regard this language as directly applicable to the case at bar. The defendant knew the purpose for which the engines were to be used, the place of their proposed use, and

Freeport, Illinois, which finding of fact seems to us to be a legal conclusion, merely concurring with the previous decision.

We cannot agree with the conclusion of the trial court that the warranty of the defendant was limited only to the operation of the engines as of the date of their delivery on the dock at Freeport. We are unable to understand by what process of reasoning a continuing warranty for a period of one year can be fulfilled by a test of the operation of the engines at the commencement of the period. Such a construction of the contract leaves the fulfillment of the warranty wholly under the control of the seller. Then the seller purchases plant to be used at a future time and plans for certain material improvements and prepaid for a reasonable time, which is this case was limited to one year, for the discovery of defects. The use of the engines must be that made by the purchaser. Minneapolis Threshing Mfg. Co. v. Hanson, 54 N. W. 331; White Mfg. Co. v. De La Vergne R. R. Co. 44 N. Y. Supp. 199.

In a case arising under a contract, wherein the defendants guaranteed the perfect working of a heating apparatus which they had put into a building for three years from the date of the completion of said operation, without additional cost to the plaintiff, the court said, with reference to the warranty:

> "As used in the contract, the words are plain and unambiguous, and bind the defendants to do just what such words imported, taken in their ordinary acceptation. * * * We find nothing in any other part of the contract that modifies the import of these words or that would authorize an attempt to restrain or change their meaning or effect." Davis v. Jenney, 45 Ill. App. 405.

We regard this language as directly applicable to the case at bar. The defendants knew the purpose for which the engines were to be used, the place of their proposed use, and

recommended the engine in question as one that would fulfill the terms of the guaranty. The great preponderance of the evidence in this case shows that there was a clear breach of warranty on the part of defendant and that the plaintiff was entitled to recover whatever damages were sustained by him on account of such breach, which include all pecuniary losses sustained by him which were directly and proximately caused by the breach of warranty. The evidence is not conclusive upon the question of damages and not sufficient to enable us to determine the amount thereof.

The judgment of the Municipal Court is reversed and the case remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

recommended the engine in question on one that would facilitate the views of the majority. The great prominence of the reference in this case shows [illegible] not a minor breach of warranty on the part of Infrabond and that the plaintiff was justified in the minor monetary damages plus prescribed by law on account of such breach. Which include its possibility losses sustained by the which were directly and proximately caused by the breach of warranty. The statement is not sufficiently clear the measure of damages and not sufficient to enable us to determine the amount thereof.

The judgment of the municipal court is reversed and the case remanded.

[illegible] and [illegible]

[illegible], [illegible] and [illegible], concur.

121 - 26288

FRANK PULLANO, Administrator of the estate of Vincenzo Pullano, deceased,
Defendant in Error,

vs.

J. T. SARACINO, doing business as Central Auto Service,
Plaintiff in Error.

ERROR TO
CIRCUIT COURT,
COOK COUNTY.

222 I.A. 633

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The defendant brings error to reverse a judgment of the Circuit Court for $4250 recovered by plaintiff, administrator, in an action on the case.

The first count of the declaration alleges in substance that on April 14, 1917, an automobile owned by defendant and driven by his servant at a speed in excess of ten miles per hour ran into and killed the decedent while the latter was crossing South Clark street between West Polk and West Harrison streets, which is a closely built up section of the City of Chicago, and that decedent was in the exercise of all due care, caution and diligence for his own safety at the time. The second count makes substantially the same allegations except that it alleges the machine was driven at a speed of fifteen miles per hour through a residence portion of the City of Chicago. A plea of the general issue and a special plea denying ownership or control of the automobile were filed.

At the suggestion of the court and before any evidence was established, the parties stipulated that "the deceased came to his death by reason of an accident occurring in the City of Chicago, on the east side of South Clark street, in the vicinity of Polk and Harrison streets, due to a collision between the man and the automobile being driven by one Wilson then in the

The defendant brings error to reverse a judgment of the Circuit Court for 22252 recovered by plaintiff, administrator, in an action on the case.

The first count of the declaration alleges in substance that on April 14, 1917, an automobile owned by defendant and driven by his servant at a speed in excess of ten miles per hour ran into and killed the decedent while the latter was crossing South Clark street between two fire hydrants at a point in the city of Chicago, and that decedent was in the exercise of all due care, caution and diligence for his own safety at the time. The second count makes substantially the same allegations except that it alleges the machine was driven at a speed of fifteen miles per hour through a residence portion of the City of Chicago. A plea of the general issue and a special plea denying ownership or control of the automobile were filed.

At the suggestion of the court and before any evidence was established, the parties stipulated that the deceased came to his death by reason of an accident occurring in the City of Chicago, on the east side of South Clark street, in the vicinity of Polk and Harrison streets, due to a collision between the

employ and doing the business of the defendant in this case, and that as the result of this accident this death occurred and that Frank Pullano is the administrator of the estate and has qualified as such; that the next of kin are Joseph C. Pullano, Samuel C. Pullano, Ralph C. Pullano, Mary Pullano and Rose Pullano, together with Rose Pullano, being the widow of the deceased." The defendant thereupon withdrew his special plea denying ownership or control.

The effect of this stipulation was to eliminate from the consideration of the jury all questions except those of the alleged negligence of the defendant, the contributory negligence, if any, of the decedent, and the amount of the damages if any.

The only negligence charged was that of driving at an excessive speed in violation of the statute in force at the time of the accident. This statute in substance provided that if the rate of speed of any motor vehicle operated upon any public highway in this state, where the same passes through the closely built up business portions of any incorporated city, town or village, exceeds ten miles an hour, or where the same passing through the residence portion of any incorporated city, town or village, exceeds fifteen miles an hour, such rates of speed shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person.

The court instructed the jury at length as to these and other provisions of the motor vehicle law not involved in the present case, and also gave the following instructions:

> "The Court instructs the jury that in an action brought to recover damages for loss of support in this suit, caused by running an automobile by mechanical power in the public highway in the City of Chicago, at a greater rate of speed than provided by law the plaintiff is deemed to have made out a prima facie

weighs and doing the business of the defendant in this case, and that as the result of his problems with drug stores and that Frank Mullano is the administrator of the estate and has qualified as such; that the next of kin are Joseph T. Mullano, Samuel C. Mullano, Ralph T. Mullano, Mary Mullano and Rose Mullano, together with Rose Mullano, being the widow of the deceased." The defendant therefore without bill, special plea raising jurisdiction is entitled.

The effect of this stipulation was to eliminate from the consideration of the jury all questions except those of the alleged negligence of the defendant, the contributory negligence, if any, of the decedent, and the amount of the damages if any.

The only negligence charged was that of driving at an excessive speed in violation of the statute in force at the time of the accident. This statute in substance provided that if the rate of speed of any motor vehicle operated upon any public highway in this state, where the same passes through the closely built up business portions of any incorporated city, town or village, exceeds ten miles an hour, or where the same passing through the residence portions of any incorporated city, town or village, exceeds fifteen miles an hour, such rates of speed shall be prima facie evidence that the person operating such motor vehicle is running at a rate of speed greater than is reasonable and proper having regard to the traffic and use of the way or so as to endanger the life or limb or injure the property of any person.

The court instructed the jury as follows in the terms and other provisions of the motor vehicle law not involved in the present case, and also gave the following instructions:

"The Court instructs the jury that in an action brought to recover damages for loss of property or injury to the person, caused by running an automobile by mechanical power in the public highway in the city of Toledo, at a greater rate of speed than provided by law, the plaintiff is deemed to have made out a prima facie

case as to the negligence of defendant by showing the fact that the person has been killed and that the person running such automobile either by himself or his agent, was at the time of the injury running the same at a speed in excess of that allowed by law."

"The Court instructs the jury that negligence is presumed on the part of an owner of an automobile for hire to run his automobile, by his employees or servants through a city, incorporated town or village, at a rate of speed prohibited by law, and if an owner of automobiles, by his employees or servants does so run his automobiles for hire and thereby injures, causes the death, or destroys the property of a person who is himself in the exercise of reasonable care and caution to avoid injury, the said owner will be liable."

These instructions were erroneous and must necessarily have had the effect of prejudicing the jury against the defendant. They do not correctly state the law as prescribed in the statute above set forth. The violation of a statute is not ordinarily negligence per se, but only one of the elements to be considered, and such violation to be material must be shown to have had a causal connection with the accident. Meyer v. Malden & Shaw Livery Co., 205 Ill. App. 274.

The statute does not expressly prohibit driving in excess of ten or fifteen miles per hour, as the case may be, but makes such driving prima facie evidence of unreasonable speed, which is prohibited. It might well be urged that because of the time at which the accident occurred and the deserted condition of the street, the rate of speed at which the machine was traveling, even in excess of fifteen miles per hour, was not greater than is reasonable. As was said in Berg v. Michell, 196 Ill. App. 515:

"In other words, there is a material and marked distinction between saying that driving at the rate of twelve miles an hour is negligence and saying that driving at that rate may or may not be negligence and putting the question to the jury to say whether or not, within the burden of proof on the defendant to show it is not."

The brief of appellee does not attempt to justify these instructions.

case as to the negligence of defendant by showing the fact that the person has been killed and that the person running such automobile either by himself or his agent, was at the time of the injury running the car at a speed in excess of that allowed by law."

"The court instructs the jury that negligence is presumed on the part of an owner of an automobile for hire in run his automobile, by his employees or servants through a city, incorporated town or village, at a rate of speed prohibited by law, and if an owner of automobile, by his employees or servants does so run his automobile for hire and thereby injures, causes the death, or destroys the property of a person who is himself in the exercise of reasonable care and caution to avoid injury, the said owner will be liable."

These instructions were erroneous and must necessarily have had the effect of prejudicing the jury against the defendant. They do not correctly state the law as prescribed in the statute above set forth. The violation of a statute is not conclusively negligence per se, but only one of the elements to be considered, and such violation is material must be shown to have had a causal connection with the accident. Ewart v. Julius I. Cohen Livery Co., 308 Ill. App. 374.

The statute does not expressly prohibit driving in excess of ten or fifteen miles per hour, as the case may be, but makes such driving prima facie evidence of unreasonable and which is prohibited. It might well be argued that because of the time at which the accident occurred and the deserted condition of the street, the rate of speed at which the machine was traveling, even in excess of fifteen miles per hour, was not greater than is reasonable. As was said in Kunz v. McDonell, 196 Ill. App. 434:

> "In other words, there is a material and marked distinction between saying that driving at the rate of twelve miles an hour is negligence and saying that driving at that rate may or may not be negligence and putting the question to the jury to say whether or not, within the burden of proof on the defendant to show it is so."

The belief of jurymen may not [illegible] to justify their verdicts.

The evidence shows that just before the accident the decedent was on the east side of Clark street and started across the street and that the automobile was then about fifteen feet away. No one testifies to having seen the automobile strike the decedent. The record is wholly silent as to whether or not the deceased was exercising due care for his own safety at the time of the accident. One witness, a child of the deceased, says that her father "looked to both sides to see if anything was coming." If this is true and deceased did not see the automobile in plain sight fifteen feet away, it is evident that the defendant was not looking but only appearing to look. Pater v. Soltes, 218 Ill. App. 647.

It was properly held in Newell v. C. C. & St. L. Ry. Co., 261 Ill. 508, as follows:

> "The allegation in the declaration that the deceased was in the exercise of due care and caution for his own safety at the time of the accident was a necessary and material allegation and must be proven. As there were no eye-witnesses to the occurrence this allegation could not be proven by any direct testimony, but it still devolved upon defendant in error to establish the exercise of ordinary care on the part of her intestate by the highest proof of which the case was capable (citing authorities). The jury were not warranted, under the rules of law as recognized in this state, in presuming, from the mere occurrence of the accident and in the absence of any direct testimony as to how it occurred, that the deceased was in the exercise of ordinary care for his own safety."

The reasoning used in that case has been followed by this court in the recent case of Foster v. Chicago Railways Co., 214 Ill. App. 663. In the present case no eye-witness testified to the occurrence and no attempt was made by plaintiff to establish the exercise of ordinary care on the part of decedent. It was held in substance by this court in the case of Vail v. Chicago Surface Lines, 214 Ill. App. 661, which was an action on the case for personal injuries resulting from an accident in which plaintiff

The evidence showed that just before the accident the deceased was on the east side of Clark street and started across the street and that the automobile was then about fifteen feet away. No one testified to having seen the automobile prior to the accident. The record is wholly silent as to whether or not the deceased was exercising due care for his own safety at the time of the accident. One witness, a child of the deceased, says that her father "looked to both sides to see if anything was coming." If this is true and deceased did not see the automobile in plain sight fifteen feet away, it is evident that the defendant was not looking but only appearing to look. Parker v. Julian, 218 Ill. App. 647.

It was properly held in Kowell v. M. C. R. R. Co., 94 Ill. App. 41, 43 Ill. App. 44, as follows:

> "The allegation in the declaration that the deceased was in the exercise of due care and caution for his own safety at the time of the accident was a necessary and material allegation and must be proven. As there were no eye-witnesses to the occurrence this allegation could not be proven by any direct testimony, but it still devolved upon defendant in error to establish the exercise of ordinary care on the part of her intestate by the greater preponderance of the evidence (citing authorities). The jury were not warranted, under the rules of law as recognized in this state, in presuming from the mere occurrence of the accident and in the absence of any direct testimony as to how it occurred, that the deceased was in the exercise of ordinary care for his own safety."

The reasoning used in that case has been followed by this court in the recent case of Keator v. Chicago Railways Co., 216 Ill. App. 683. In the present case no eye-witness testified to the occurrence and no attempt was made by plaintiff to establish the exercise of ordinary care on the part of deceased. It was held in substance by this court in the case of Wall v. Chicago Junction Lines, 214 Ill. App. 681, which was an action on the case for personal injuries resulting from an occurrence in which plaintiff

was struck by a street car, that where the evidence indicated that if plaintiff failed to see an approaching street car it was because he failed to look, and that by the exercise of ordinary care plaintiff could have seen the car while he was approaching the track, the law made it his duty to see it and failure in that respect precludes a recovery.

In finding the defendant guilty of negligence the jury were unquestionably influenced by the erroneous instructions above mentioned, and in so far as the verdict is a finding that the decedent was in the exercise of due care and caution for his own safety at the time of the accident, it is wholly unsupported by the evidence.

The judgment of the Circuit Court is reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

was struck by a street car, that there the evidence indicated that if plaintiff failed to see an approaching street car it was because he failed to look, and that by the exercise of ordinary care plaintiff could have seen the car while he was approaching the track, she saw made it his duty to see it and failure in that respect proximate a tort.

In finding the defendant guilty of negligence the jury were unnecessarily influenced by the erroneous instructions above mentioned, and is so far as the trial is a finding that the deceased was in the exercise of due care and caution for his own safety at the time of the accident, it is wholly unsupported by the evidence.

The judgment of the Circuit Court is reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

Grattan, J., and Burnes, J., concur.

138 - 26305

DOMINICK MARUNIO,
Appellant,

vs.

WALTER D. HINES, Director
General United States Railroads,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Suit was brought in the Municipal Court of Chicago to recover damages sustained by plaintiff on account of a collision between certain automobile trucks owned and operated by him and a train on the Chicago, Milwaukee & St. Paul Railroad, which was at that time operated by the Director General of Railroads.

The statement of claim alleges that on October 25, 1920, the agents of plaintiff were operating two of his trucks, one of which was towing the other, and that the two trucks were damaged by reason of the negligent operation of the train in question at the intersection of Jefferson and North Water streets in Chicago. Defendant denied the negligence and denied that plaintiff was in the exercise of due care and caution for the safety of his trucks.

The evidence shows that the railroad, consisting of four tracks, crossed Jefferson street at right angles; that the street was paved north and south of the tracks with concrete blocks and usual space of two and three-quarters inches left open for the purpose of permitting the flange of the car wheel to pass over the crossing. The crossing was protected by a flagman, whose duty it was to signal when the tracks were clear for the benefit of those desiring to cross. Two automatic electric crossing bells, one on each side of the tracks, were maintained to signal the approach of trains.

MR. JUSTICE MORRIS, DELIVERED THE OPINION OF THE COURT.

Suit was brought in the Municipal Court of Chicago to recover damages sustained by plaintiff on account of a collision between certain horse-drawn trucks owned and operated by him and a train on the Chicago, Milwaukee & St. Paul Railroad, which was at that time operated by the Director General of Railroads.

The statement of claim alleges that on October 28, 1920, the agents of plaintiff were operating two of his trucks, one of which was towing the other, and that the two trucks were damaged by reason of the negligent operation of the train in question at the intersection of Jefferson and North Water streets in Chicago. Defendant denied the negligence and denied that plaintiff was in the exercise of due care and caution for the safety of his trucks.

The evidence shows that the railroad, consisting of four tracks, crossed Jefferson street at right angles; that the street was lined north and south of the tracks with freight sheds and usual space of two and three-quarters inches left open for the purpose of permitting the flange of the car wheel to pass over the crossing. The crossing was protected by a flagman, whose duty it was to signal when the tracks were clear for the benefit of those desiring to cross. The motor-truck directly crossing tracks, and on side all of the tracks, were substituted in place of the approach of trains.

The accident occurred shortly after six o'clock in the evening. The flagman signalled the driver of a wagon loaded with hay and the drivers of the two auto trucks, standing south of the tracks, to cross. He did not know at the time that the second truck was disabled and being towed. The driver of the hay wagon started at once and crossed in safety. The two trucks followed shortly after, but before completely crossing the tracks the collision with the train took place. There is some dispute as to the point of impact.

There is sharp conflict between the testimony of the witnesses for the respective parties as to the condition of the rear right wheel of the truck which was being towed. The witnesses for plaintiff assert that it was equipped with a dolly and that the leading truck, which was towing the other, was not delayed in its crossing but was under power and moving all the time, while witnesses for defendant say that the rear right wheel was off and the axle trailing in the street, so that it became fastened in the south rail of the track, bringing the leading truck to a complete stop.

The testimony of the two sets of witnesses was in other respects conflicting. Under such circumstances it is the special province of the jury to decide where the truth lies. This is a familiar rule and no extensive citation of authorities is needed to support it. The court said in Piper v. Hendricks, 209 Ill. 565:

> "The jury heard these witnesses testify and it was preeminently within their power to determine which were the more worthy of belief. The trial judge also saw and heard the witnesses and approved of the verdict of the jury. In that state of a record this court will not disturb the verdict unless it is manifestly against the weight of the evidence."

The verdict in the case at bar was not manifestly against the weight of the evidence, and for that reason cannot be disturbed.

The witness testified directly after all evidence in the evening. The figures signalled the arrival of a train issued with day and the drivers of the two auto trucks, crossing south of the tracks, to cease. He did not know at the time that these trucks were directly and being towed. The driver of the day worker started at once and crossed in safety. The two trucks followed shortly after, but before completely crossing the tracks the collision with the train took place. There is some dispute as to the point of impact.

There is sharp conflict between the testimony of the witnesses for the respective parties as to the condition of the rear right wheel of the truck which was being towed. The witness for plaintiff asserts that it was twisted with a jolt and that the leading truck, which was towing the other, was not damaged in the crossing but was under power and moving all the time, while witnesses for defendant say that the rear right wheel was off and the axle trailing in the street, so that it became fastened in the south rail of the track, bringing the leading truck to a sudden stop.

The testimony of the two sets of witnesses was in other respects conflicting. Under such circumstances it is the special province of the jury to decide where the truth lies. This is a familiar rule and no extensive citation of authorities is needed to support it. The court said in Ellis v. Hopkins, 200 Ill. 525:

> "The jury heard these witnesses testify and it was peculiarly within their power to determine which were the more worthy of belief. The trial judge also saw and heard the witnesses and approved at the verdict of the jury. In that state of a record this court will not disturb the verdict unless it is manifestly against the weight of the evidence."

The proviso in the case at bar was not manifestly against the

Appellant also urges that there was reversible error on account of the conduct of defendant's counsel in confusing, embarrassing and intimidating one of the witnesses for the plaintiff. The record does not sustain this contention. The incident to which counsel alludes in his brief was quite unimportant and could not have affected the jury in any manner.

Appellant also complains that a certain statement alleged to have been signed by a witness was not offered in evidence in conformity with the statement of defendant's counsel that it would be so offered. The record does not show that counsel for the defendant gave any such assurance. Consequently there is no ground for this complaint.

Another reason for reversal is urged on account of an improper argument said to have been addressed to the jury by the attorney for the defendant. The single paragraph from the argument, which is included in the record, seems to have been a reasonable comment upon the testimony of one of the witnesses. It was so held by the court, who heard the testimony and the entire argument. This isolated paragraph, even if held to be improper, would not be a sufficient ground for reversal.

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

Appellant also urges that there was reversible error on account of the counsel of defendant's counsel in commenting, embarrassing and humiliating one of the witnesses for the plaintiff. The record does not justify this contention. The remarks to which counsel alludes in his brief was quite unimportant and could not have affected the jury in any manner.

Appellant also complains that a certain statement alleged to have been stated by a witness was not offered in evidence in conformity with the statement of defendant's counsel that it would be so offered. The record does not show that counsel for the defendant gave any such assurance. Consequently there is no ground for this complaint.

Another reason for reversal is urged on account of an improper argument said to have been addressed to the jury by the attorney for the defendant. The single paragraph from the argument, which is included in the record, seems to have been a reasonable comment upon the testimony of one of the witnesses. It was so held by the court, who heard the testimony and the entire argument. This isolated paragraph, even if held to be improper, would not be a sufficient ground for reversal.

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

Affirmed.

Brickly, P. J., and Barnes, J., concur.

185 - 26358

JOSEPHINE KRAUS,
Appellee,

vs.

EVAN H. M. GRIFFITHS,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 634

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The plaintiff, who is the appellee here, and the lessor in a certain lease hereinafter described, brought an action of forcible detainer against the defendant, who is the appellant here, to recover possession of the premises described in the lease. The lease in question was dated January 10, 1916, and demised flat number 1 on the second floor of the building known as 4500 West Harrison street to the lessee for a term commencing October 1, 1916, and ending September 30, 1921. The premises were to be used solely as a "doctor's offices and dwelling or offices." The suit is based upon an alleged violation by the lessee of the following covenant contained in the lease, to-wit:

> "4. That he (the lessee) will not allow said premises to be occupied in whole or in part by any other person and will not sublet the same nor any part thereof nor assign this lease without <u>in each case</u> the written consent of the party of the first part first had, and will not permit any transfer by operation of law of the interest in said premises acquired through this lease, etc."

The lease also gives the lessor the right, in case of default of any of the covenants and agreements therein contained to be kept by the lessee, to declare the term ended and to reenter the demised premises or any part thereof with or without process of law.

It is admitted by both parties that the demised premises consist of eight rooms, the four front rooms of which were used by appellant as a doctor's office, and the four rooms in the rear as a dwelling. The defendant had been in possession of the premises under a prior lease and had lived in the rear four rooms but had moved therefrom in 1916. Afterwards he sublet the four rear rooms to a Mrs. Riley, who occupied these rooms until some time in 1918. They were then sublet to a Mr. Ludford, who occupied them until about the middle of 1920. Both of these sublettings were with the consent of the lessor, given orally. The husband of the lessor was her agent in managing the building and all dealings with the lessee were conducted by him.

It is claimed by the lessee that on May 15, 1920, he met the husband of the lessor, who was accompanied by his attorney, and that he then stated to them in substance that Ludford was going to move out and that he wished to install one Moynihan in the premises, to which arrangement the husband and agent of the lessor then assented. Defendant denies, however, that any such consent was given, although the fact that the conversation was held at the time named appears to be admitted. It is not claimed by the appellant that any written consent was obtained from the lessor to the subletting to Moynihan.

It is contended by the appellant that the previous sublettings to Riley and Ludford constituted a waiver of the covenant above quoted restricting the right of subletting, and in effect licensed and permitted the lessee to continue to sublet. We cannot agree with this contention. The covenant in the lease provides that "he will not sublet the same nor any part thereof without <u>in each case</u> the written consent of the

It is admitted by both parties that the desired premises subject of legal proceedings, the four-room house of which were used by squatters as a dwelling, was the first room in the rear as a dwelling. The defendant had been in possession of the premises under a verbal lease and had lived in the front room but had moved therefrom in 1928. Afterwards he sublet the four rear rooms to a Mrs. Tilley, who occupied these rooms until some time in 1932. They were then subject to a Mr. Lafferty, who occupied them until about the middle of 1933. Both of these sublettings were with the consent of the lessor, given orally. The husband of the lessor was her agent in managing the building and all dealings with the lessee were conducted by him.

It is claimed by the lessee that on May 16, 1934, he met the husband of the lessor, who was accompanied by his attorney, and that he then spoke to them in substance that Lafferty was going to move out and that he wished to install our daughter in the premises, to which proposal the husband and agent of the lessor then assented. Defendant denies, however, that any such conversation took place, although the fact that the conversation was held is the time never attempts to be explained. It is not claimed by the applicant that either consent was obtained from the lessor or his agent, to possession.

It is contended by the defendant that the previous multilations by light and heavy constituted a waiver of the covenant from which restrictions for right of multilation, and it is first discovered and complained the lessor in violation in violation. The defendant claims that the will not multil the room not may part thereof without in such case the written consent of the

party of the first part first had." There is nothing ambiguous or uncertain in regard to this provision of the lease. The lessee agrees in plain terms not to sublet without the written consent of the lessor in each case. They further mutually covenant that if default should be made in any of the covenants (which included the covenant not to sublet without the written consent of the lessor) then the lessor had the right to declare the term ended and reenter. This is not merely a covenant not to sublet, but is a power of reentry for the breach of a covenant, which has the force of a condition. While it is true that in the construction of deeds, courts will incline to interpret such language as a covenant rather than as a condition, yet where the intention of the parties to the instrument is clearly ascertained, it must control. In the case at bar there is no question whatever as to the intention of the parties. Kew v. Trainer, 150 Ill. 180; Hartford Deposit Co. v. Rosenthal, 192 Ill. 311. In fact, the necessity of obtaining the consent of the lessor appears to be admitted by the lessee, who offered proof tending to show that the oral consent of lessor's agent was obtained. We regard this evidence as immaterial.

It is also urged by appellant that the notice of the termination of the tenancy was insufficient in that it did not accurately describe the demised premises. We think that the notice was sufficient. It states in substance that the lessee has violated the lease in subletting the rear flat of the premises at 4500 West Harrison street and that because of such violation the lease of January19, 1916, is terminated. Possession is demanded of the entire premises and not of the rear four rooms solely. A notice to terminate a tenancy cannot be held to be defective where it is not misleading and proof has been made without objection that the demised premises and those named in the notice

party of the first part first had." There is nothing ambiguous or uncertain in regard to this provision of the lease. The lease expires in plain terms not to middle without the written consent of the lessor in each case. They further emphatically insist that if default should be made in any of the covenants (which included the covenant not to sublet without the written consent of the lessor) then the lessor had the right to declare the term ended and reenter. This is not merely a covenant not to sublet, but is a power of reentry for the breach of a covenant, which has the force of a condition. While it is true that in the construction of leases, courts will incline to interpret such language as a covenant rather than as a condition, yet where the intention of the parties to the instrument is clearly ascertained, it must control. In the case at bar there is no question whatever as to the intention of the parties. Hew v. Trainor, 187 Ill. 169; Hartford Deposit Co. v. Shaughnessy, 192 Ill. 413. In fact, the necessity of obtaining the consent of the lessor seems to be admitted by the lessee, who offered proof tending to show that the oral consent of lessor's agent was obtained. We regard this evidence as immaterial.

It is also urged by appellant that the notice of the termination of the tenancy was insufficient in that it did not accurately describe the leased premises. In this just the notice was sufficient. It states in substance that the lessee has violated the lease in maintaining the beer flat of the premises at 6247 West Harrison street and that a hearing of such violation the issue of January19, 1914, is terminated. Reasonable in demanded of the entire premises and not of the room from which violation. A notice to terminate a tenancy cannot be held to be defective where it is not misleading and where it has been such a notice that the district possession and there cannot be the slightest

are the same. Farnam v. Hohman, 90 Ill. 312.

It must be presumed that the trial court correctly decided all questions of law arising in the case for the reason that no written propositions of law were submitted, to be ruled upon. Barrere v. Griffith, 109 Ill. App. 165.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

are the same. Fleming v. Dempsey, 94 Ill. 339.

It must be presumed that the trial court's particularly careful consideration of the evidence in the case for the reason that no written pronouncements of law were rendered, is no minor error. Sherman v. Kitzing, 199 Ill. 198, 187.

The judgment of the municipal court is affirmed.

Affirmed.

Gridley, P. J., and Barnes, J., concur.

194 - 26367

JAMES J. HARRINGTON,
Appellant,

vs.

JOHN E. STELLWAGEN,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

222 I. A. 334

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The appellant, who was the plaintiff below, brought an action of assumpsit in the Superior Court to recover commissions in payment for his services as a real estate agent in selling the property of the defendant upon the theory that the plaintiff had an exclusive agency for the sale of the property and that he procured a customer who was ready, willing and able to purchase the property at the price agreed upon by the owner.

To sustain his claim of an exclusive agency the following agreement, signed by the defendant, was in evidence:

> "I hereby grant you, for a period of three months from this date and thereafter until this agreement is revoked by notice in writing delivered to you, the exclusive right to sell the property hereinafter described; and in consideration of your accepting said agency and endeavoring to sell said property, I agree to pay you a broker's commission at the regular Real Estate Board of Chicago rates on the price obtained. If a purchaser is procured during said period by you or anyone else upon the terms named or upon such other terms which I may see fit to accept."

Then follows a brief description of the property and a statement of the price, which was $50 per front foot. The terms of sale are not specified. It also contained the agreement of the owner of the property to furnish a merchantable abstract of title or a title guarantee policy. This instrument was signed by defendant and accepted by plaintiff, as shown by the latter's signature thereon. In our opinion it was sufficient to create the agency claimed and if plaintiff produced a customer able, ready and

MR. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

The appellant, who was the plaintiff below, brought an action of assumpsit in the Superior Court to recover commissions in payment for his services as a real estate agent in selling the property of the defendant upon the theory that the plaintiff had an exclusive agency for the sale of the property and that he procured a purchaser who was ready, willing and able to purchase the property at the price agreed upon by the owner.

To sustain his claim of an exclusive agency the following agreement, signed by the defendant, was in evidence:

> "I hereby grant you, for a period of three months from this date and thereafter until this agreement is revoked by notice in writing delivered to you, the exclusive right to sell the property hereinafter described; and in consideration of your accepting said agency and endeavoring to sell said property, I agree to pay you a broker's commission at the regular Real Estate Board of Chicago rates on the price obtained. If a purchaser is procured during said period by you or anyone else upon the terms named or upon such other terms which I may see fit to accept."

Then follows a brief description of the property and a statement of the price, which was $80 per front foot. The terms of sale are not specified. It also contains the agreement of the owner of the property to furnish a merchantable abstract of title or a title guarantee policy. This instrument was signed by defendant and accepted by plaintiff, as shown by the latter's signature thereon. In our opinion it was sufficient to create the agency claimed and if plaintiff produced a purchaser able, ready and

willing to buy upon the terms agreed upon between the owner and the agent, the agent is entitled to his commission at the Real Estate Board rates, which are shown to have been five per cent upon the sale price for the property involved.

In support of his claim that he produced such a customer, plaintiff offered in evidence a copy of an agreement with Lindstrom Smith Company, a corporation, under the terms of which the company agreed to purchase the property in question for the sum of $17,500. The contract, with the signature of the purchaser and its certified check for $2,000, was deposited in escrow with the National City Bank. The terms of the escrow were that in case the defendant signed the contract within three days, then the purchaser would allow the contract and check to remain in escrow, pending the fulfillment of the details of the agreement, otherwise Lindstrom Smith Company should have the right to withdraw the check and agreement from the escrow. The agreement also had attached to it, and forming a part thereof, a rider in which it was provided that the defendant should at the time of the delivery of his deed under the contract furnish a written consent in proper form permitting the purchaser to erect upon the premises a two-story, mill constructed factory building, such consent to be signed by "all municipalities, governmental agencies and individuals that under the laws of the State of Illinois or the ordinances of the City of Chicago, or any other governmental agency or municipality having jurisdiction of said premises, have a right to object to the erection of said building and to the use of the same by the said Lindstrom Smith Company for the carrying on of the business now being carried on by it." It appears from the evidence that a permit from the building department of the City of Chicago was a necessary re-

million, to buy upon the terms agreed upon between the owner and the agent. The agent is entitled to his commission at the usual Estate Board rates, which are deemed to have been fixed per cent upon the sale price for the property involved.

In support of his claim that he produced such a purchaser, plaintiff offered in evidence a copy of an agreement with Lakeview Realty Company, a corporation, under the terms of which the company agreed to purchase the property in question for the sum of $19,800. The contract, with the signature of the purchaser and its certified check for $1,000, was deposited in escrow with the Eastland City Bank. The terms of the escrow were that in case the defendant signed the contract within three days, then the purchaser would allow the contract ten days in which to "close", yielding the [illegible] of the deposit, if the purchaser failed to close. Plaintiff's claim should have the right to retain the total commission from the escrow. The agreement also had attached to it, and forming a part thereof, a rider in which it was provided that the defendant should at the time of the delivery of his deed duly signed the right to furnish a written document in proper form permitting the purchaser to erect upon the premises a two-story, well constructed factory building, such manner to be signed by "All municipalities, governmental agencies and individuals that under the laws of the State of California or the ordinances of the City of Eastland, or any other governmental agency or municipality having jurisdiction of said premises, have a right to object to the erection of said building and to the use of the same by the said Lakeview Realty Company for the carrying on of the business now being carried on by it." It appears from the evidence that a permit from the building department of the City of Eastland was a necessary pre-

quisite to the erection of such a building. The defendant did not comply with the terms of the escrow; did not sign the agreement of sale within three days or at any time.

We are of the opinion that the contract of sale to Lindstrom Smith Company, including the provisions last mentioned, were not a fulfillment of the terms set forth in the agency contract first above quoted and that the variations contained in the rider forming a part of the contract of sale were of such character and importance as to warrant the defendant in refusing to execute the contract. It therefore follows that the plaintiff did not furnish a purchaser ready, willing and able to purchase the property upon the terms agreed upon or upon such other terms as the owner saw fit to accept and is not entitled to a commission on account of the proposed sale to Lindstrom Smith Company.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

variable in the execution of such a building. The contractor did not comply with the terms of the tender; did not sign the agreement of sale within three days or at any time.

We are of the opinion that the contract of sale in question with Company, including the provision last mentioned, was not a fulfillment of the terms set forth in the agency contract first above quoted and that the variations contained in the rider forming a part of the contract of sale were of such character and importance as to warrant the defendant in refusing to execute the contract. It therefore follows that the plaintiff did not furnish a purchaser ready, willing and able to purchase the property upon the terms agreed upon or upon such other terms as the owner was ill to accept and is not entitled to a commission on account of the proposed sale to Kindersen with Company.

The judgment of the Superior Court is affirmed.

IMPLEAD.

Gridley, J. J., and Dunne, J., concur.

209 - 26382

ANNIE E. KERNAN,
Appellee,

vs.

JOHN A. STAGG,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 634

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The plaintiff in the court below, who is the appellee here, brought an action of forcible detainer against defendant, who is the appellant here, to recover possession of a flat on the first floor of the building at No. 2751 West Adams street. Prior to bringing the suit she gave the tenant what is ordinarily termed a thirty day notice to terminate his tenancy on April 30, 1920.

The case was heard by the court and jury. At the close of the testimony the court instructed the jury to return a verdict in favor of the plaintiff, which was done, and thereupon judgment for possession was entered and a writ of restitution ordered. From this judgment an appeal was prayed and perfected to this court.

The only question in controversy in the case is based upon the sufficiency of the thirty day notice. It is contended by appellant that he was a tenant by the year, in which case a sixty day notice would be necessary to terminate the tenancy, while on the theory of the plaintiff he was a tenant from month to month, requiring a thirty day notice only. The trial court held that the tenancy was from month to month and that the notice terminating the tenancy was sufficient. The evidence as to the commencement of defendant's tenancy, which was in the year 1913

No. 2222 - Parts

ROBERT E. KEMMERER,

Appellee,

vs.

ALBERT A. BLADE,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

222 I.A. 634

MR. JUSTICE PRESIDING DELIVERED THE OPINION OF THE COURT.

The plaintiff in the court below, who is the appellee here, brought an action of forcible detainer against defendant, who is the appellant here, to recover possession of a flat on the first floor of the building at No. 2711 Cottage Grove Avenue. Prior to bringing the suit the lease the tenant was ordinarily termed a thirty day notice to terminate his tenancy on April 30, 1930.

The case was heard by the court and jury. At the close of the testimony the court instructed the jury to return a verdict in favor of the plaintiff, which was done, and thereupon judgment for possession was entered and a writ of restitution ordered. From this judgment an appeal was prayed and perfected to this court.

The only question in controversy in the case is based upon the sufficiency of the thirty day notice. It is contended by appellant that in view a tenant by the year, in which case a thirty day notice would be necessary to terminate the tenancy, while on the theory of the plaintiff he was a tenant from month to month, requiring a thirty day notice only. The trial court held that the tenancy was from month to month and that the notice terminating the tenancy was sufficient. The evidence as to the commencement of defendant's tenancy, which was in the year 1923

and prior to May 1st of that year, and its continuance during the intervening years from that date to the time of giving the notice on March 31, 1920, is somewhat indefinite and contradictory, but it is apparent from the testimony of both parties to the transaction that the original contract was made prior to May 1, 1913, which precludes the idea of an oral leasing for one year. No written lease was ever made of the premises.

No propositions of law were submitted and therefore it must be presumed that the court ruled correctly upon the law applicable to the case. The undisputed evidence shows that the original leasing covered a period in excess of one year, and also that during the intervening period in June, 1919, the terms of the tenancy were modified so as to render untenable the position that there was an oral lease for a year. Under these circumstances we are of the opinion that the Municipal Court was justified in holding that the tenancy was from month to month and was properly terminated by the notice in question.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

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No propositions of law were submitted and therefore it must be presumed that the court ruled correctly upon the law applicable to the case. The undisputed evidence shows that the original leasing covered a period in excess of one year, and also that during the intervening period in June, 1919, the terms of the tenancy were modified so as to render untenable the position that there was an oral lease for a year. Under these circumstances we are of the opinion that the Municipal Court was justified in holding that the tenancy was from month to month and was properly terminated by the notice in question.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Swaldley, P. J., and Brown, J., concur.

218 - 26391

MILKA MIRICH, a minor, by NICHOLAS MIRICH, her next friend, Appellee, vs. T. J. WORSCHNER CONTRACTING COMPANY, a corporation, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought in the Circuit Court by the appellee, a minor, by her mother as next friend, against appellant to recover damages for the loss of several fingers which were crushed by the wheels of a train of cars, both train and the track on which it was running being used by defendant in hauling dirt. The injury is alleged to have been occasioned by the negligence of the defendant. The case was tried by a jury and resulted in a verdict in favor of appellee for $12,500. A motion for a new trial and a motion in arrest of judgment were denied and judgment entered on the verdict. Appellant brings the case to this court to effect a reversal of the judgment upon the ground that the verdict and judgment are contrary to the evidence and the law applicable thereto.

The case was tried upon a declaration of one count and a plea of the general issue. The declaration alleged that the defendant was excavating and constructing a section of the Calumet-Sag channel and had constructed and was using a railroad operating dump cars and locomotives thereon to haul dirt; that plaintiff's father resided with his family in a house near the track used by defendant; that defendant had authorized and per-

This was an action on the case brought in the circuit court by the appellee, a minor, by her mother as next friend, against appellant to recover damages for the loss of several fingers which were crushed by the wheels of a train of cars, both train and the track on which it was running being used by defendant in hauling dirt. The injury is alleged to have been occasioned by the negligence of the defendant. The case was tried by a jury and resulted in a verdict in favor of appellee for $12,500. A motion for a new trial and a motion in arrest of judgment were denied and judgment entered on the verdict. Appellant brings the case to this court in effect a reversal of the judgment upon the ground that the verdict and judgment are contrary to the evidence and the law applicable thereto.

The case was tried upon a declaration of one count and a plea of the general issue. The declaration alleged that the defendant was excavating and constructing a portion of the Calumet-sag channel and had constructed and was using a railroad operating dump cars and locomotives thereon to haul dirt; that plaintiff's father resided with his family in a house near the track used by defendant; that defendant had undertaken and per-

mitted him and his family to live in the house and to conduct therein a boarding house for workmen employed by defendant; that plaintiff was three years of age and was lawfully walking along and near to the tracks and was in the exercise of ordinary care for a person of her age when defendant, by its servants in charge of a train of dump cars propelled by a locomotive along the tracks near the plaintiff, negligently and carelessly ran and operated the dump cars and locomotive without keeping any lookout ahead of the same, and without sounding any warning signals of danger to the plaintiff or taking any precautions whatever to stop the cars and engine or to avoid striking plaintiff, and that by reason of, and as a proximate consequence of the negligence of defendant's servants, the cars and locomotive, or some of them, ran against and struck the plaintiff and some of the wheels of the cars or the locomotive ran over the hands of plaintiff, cutting off three fingers from one of her hands.

After all of plaintiff's evidence had been introduced and a motion to direct a verdict for defendant had been argued and denied, plaintiff filed a first additional count in substantially the same language as the original declaration, with the additional allegation that the defendant's servants failed to stop its locomotive and train of cars when danger was imminent to the plaintiff and carelessly, recklessly and wantonly ran its train upon and against the plaintiff. A plea of the general issue and a special plea denying ownership on the part of the defendant were filed to this count.

The evidence in the case shows that the accident occurred on June 27, 1917. At that time the defendant was engaged in working upon a contract with the Sanitary District of Chicago to construct a section of the Calumet intercepting sewer along a route

mitted him and his family to live in the house and to conduct therein a boarding house for workmen employed by defendant; that plaintiff was three years of age and was lawfully walking along and near to the tracks and was in the exercise of ordinary care for a person of her age when defendant, by its servants in charge of a train of dump cars propelled by a locomotive along the tracks near the plaintiff, negligently and carelessly ran and operated the dump cars and locomotive without keeping any lookout ahead of the same, and without sounding any warning signals of danger to the plaintiff or taking any precautions whatever to stop the cars and engine or to avoid striking plaintiff, and that by reason of, and as a proximate consequence of the negligence of defendant's servants, the cars and locomotive, or some of them, ran against and struck the plaintiff and some of the wheels of the cars or the locomotive ran over the hands of plaintiff, mutilating all three fingers from one of her hands.

After all of plaintiff's evidence had been introduced and a motion to direct a verdict for defendant had been argued and denied, plaintiff filed a first additional count in substantially the same language as the original declaration, with the additional allegation that the defendant's servants failed to stop its locomotive and train of cars when danger was imminent to the plaintiff and carelessly, recklessly and wantonly ran its train upon and against the plaintiff. A plea of the general issue and a special plea denying ownership on the part of the defendant were filed in this court.

The evidence in the case shows that the accident occurred on June 27, 1917. At that time the defendant was engaged in working upon a contract with the Sanitary Districts of Chicago to construct a section of the Calumet interceptor sewer along a route

which included 127th street. The Sanitary Board reserved the right to furnish its own dumping place for the spoil and did furnish such dumping place upon a certain lowland lying three quarters of a mile south of 127th street on the Little Calumet River and to the west of the right of way of the Pennsylvania Railroad Company. It had secured the right to dump the excavated soil upon this track and to lay tracks and operate dummy engines over the land. This right of dumping and operation the defendant was authorized, by the Sanitary Board, to exercise. The defendant entered into an agreement with the Pennsylvania Railroad Company whereby it secured the right to lay tracks upon the railroad company's right of way over a stretch of land seventeen feet wide on the west side of the railroad tracks for a distance of 1190 feet south of 127th street to the Indian boundary line, where the land provided for dumping space begins and runs thence south to the river. The defendant constructed a track in the Fall of 1917 from 127th street south along the right of way of the Pennsylvania Railroad to the Indian boundary line, a distance of 1190 feet. The track then curved to the west to the dumping space and continued in a southwesterly direction to the river.

The father of the plaintiff made an arrangement with the manager of the defendant company whereby he built a house or a shanty on a high piece of ground in the northerly part of the dumping space and south of the Indian boundary line, which house was used by plaintiff's father as a boarding place for a gang of laborers who were brought by plaintiff's father to work for the contractor in performing the contract above mentioned. There was some conversation between these parties as to the right of either of them to erect a structure of this kind upon the dumping ground, but the house was erected in 1917 about thirty feet west of the

white Canadian little school. The defendant Smart reserved the right to furnish its own dumping place for the spoil and all Canadian work employing Canadian labor and a certain Indian lying about midway of a mile south of 127th street on the Little Calumet River and to the west of the right of way of the Pennsylvania Railroad Company. It had secured the right to dump the excavated soil upon this track and to lay tracks and operate dummy engines upon the land. This rights of dumping and operation the defendant was authorized, by the Sanitary Board, to exercise. The defendant entered into an agreement with the Pennsylvania Railroad Company whereby it secured the right to lay tracks upon the railroad company's right of way over a stretch of land seventeen feet wide on the west side of the railroad tracks for a distance of 2180 feet south of 127th street to the Indian boundary line, where the land provided for dumping space begins and runs thence south to the river. The defendant constructed a track in the fall of 1917 from 127th street south along the right of way of the Pennsylvania Railroad to the Indian boundary line, a distance of 2180 feet. The track then curved to the west to the dumping space and continued in a southwesterly direction to the river.

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Forschner tracks and the expense of the labor and materials used in the erection of the same was paid by plaintiff's father. The house faced the west but had an enclosed porch on the east side toward the tracks. The mother of the plaintiff testified that she never allowed her children to play near the tracks; that the porch was closed so that they could not get out, but that on the day of the accident plaintiff had slipped out the front way, which was on the side of the house farthest from the tracks; that plaintiff was gone about five minutes before the accident occurred. No evidence was introduced showing that any children had ever been seen near these tracks. South of 127th street there are no roads or crossings and no other habitations nearby. The tracks run for 1190 feet on the right of way of the Pennsylvania Railroad, which was fenced on both sides.

The accident occurred at about 1 P. M. of the day mentioned on the part of the track which was located on the Pennsylvania railroad right of way at a point apparently some two hundred feet or more from the house occupied by plaintiff's parents. The train was moving in a southerly direction and consisted of several dumping cars loaded with dirt which were being pushed by an engine. Two men were on the train; one of them, Perkowich, was standing on the second car from the front and the other, Marriott, was the engineer in charge of the engine which was on the rear end of the train. Perkowich testified that he saw a child right in the middle of the track when the train was about 150 feet away; that he immediately began waving his hands to stop and shouted to the engineer, which he continued to do while the train was running over practically five rails; that he saw the engineer at the time but the latter was looking and waving his hand at some girls working over in the asparagus field and did not look towards Perkowich. Perkowich then jumped

-2-

foreshore tracks and the expense of the labor and materials used in the erection of the house was paid by plaintiff's father. The house faced the west but had an enclosed porch on the east side toward the tracks. The mother of the plaintiff testified that she never allowed her children to play near the tracks; that the porch was closed so that they could not get out, but that on the day of the accident plaintiff had slipped out the front way, which was on the side of the house furthest from the tracks; that plaintiff did not come right into the house before the incident occurred.

No evidence was introduced showing that any children had ever been seen near these tracks. Still at night there are no trees or screening and no other habitations nearby. The tracks for 1189 feet on the right of way of the Pennsylvania Railroad were fenced on both sides.

The accident occurred at about 1 P. M. of the day mentioned on the part of the track which was located on the Pennsylvania railroad right of way at a point apparently some ten hundred feet or more from the house occupied by plaintiff's parents. The track was moving in a southerly direction and consisted of several dumping cars loaded with dirt which were being pushed by an engine. Two men were on the truck; one of them, Berkowitz, was standing on the loaded car from the front and the other, Barrett, was the engineer in charge of the engine which was on the rear end of the train. Berkowitz testified that he saw a child right in the middle of the track when the train was about 150 feet away; that he immediately began waving his hands to stop and shouted to the engineer, which he continued to do while the train was running over practically five rails; that he saw the engineer at the time but the latter was looking and waving his hand at some girls standing over in the cornfield first and did not hear Berkowitz. Berkowitz then jumped

from the train and tried to save the child but was too late. His testimony on cross examination modifies this statement somewhat in that he says when he first saw the child, she was at the rail and not in the middle of the track.

The engineer testified that he was not waiving his hand to girls in the asparagus field and that he did not see any girls there and did not see or hear any signals given by Terkowich; that the first he knew of the little girl's presence was when he heard her scream at the time of the accident; that he applied the brakes, stopped the train immediately and ran back and picked up the child, who was lying in the weeds to the west of the track. The injury sustained to the left hand was the loss of the second, third and fourth fingers with some damage to the index finger of the left hand. The last joint of the third finger on the right hand was crushed.

Appellant contends that the court erred in refusing to direct a verdict for the defendant upon the ground that the defendant was not shown to have been guilty of any negligence or of any wanton or wilful action in injuring the plaintiff; that in fact, the defendant owed no duty to the plaintiff, who was a mere trespasser or licensee upon the premises; that the court also erred in the rejection of proper testimony offered by defendant and in giving certain instructions for plaintiff and in refusing to give certain instructions for defendant; that the verdict is excessive and the result of prejudice and passion, and that counsel for plaintiff in his final argument to the jury made improper and erroneous statements which prejudicedappellant's rights and that the court erred in refusing to grant a new trial and in refusing appellant's motion in arrest of judgment.

From a careful reading of appellee's brief we have been

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From a careful reading of appellee's brief we have been

unable to discover that any act of negligence on the part of defendant has been proved. We find only a perfunctory argument advanced in the brief based upon the theory of negligence on the part of defendant. The evidence itself does not disclose any negligence in operating the train of cars.

It seems to be the theory of the appellee that the plaintiff on account of her tender age cannot be regarded as a trespasser upon the right of way where the accident occurred, and that there is evidence of wilfulness or wantonness on the part of defendant and that by some process of reasoning, which is not altogether clear, the child was on the track by invitation of the defendant. This latter claim seems to be based upon the fact that plaintiff's father had been employed by the defendant and had been permitted to build a boarding house upon the dumping place. It will be noted that the accident took place at a considerable distance from the house of plaintiff's father and not upon the ground reserved for dumping space. No authorities are cited in appellee's brief which would tend to show that these transactions between plaintiff's father and the defendant could be considered as an invitation for the child to go upon the tracks. There is no claim made or argument advanced that the defendant was maintaining an attractive nuisance.

It is the well settled law of this state that no duty is owed to a trespasser or a licensee except the duty of avoiding wanton and wilful injury to such trespasser. Wilfulness and wantonness involve an utter disregard for the lives and safety of others, and to sustain a charge of wilful or wanton conduct it is necessary to show a general intent to inflict injury. The question of negligence is not involved in a case charging wilful and wanton conduct. The rule that no duty is owed to a trespasser or licensee

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except the avoidance of wilful and wanton injury is equally applicable to the case of a minor. Norman v. Bartholomew, 104 Ill. App. 667. It was held by this court that the only duty which a railroad company owes to a minor trespassing upon its right of way is not wilfully and wantonly to inflict an injury. Colby v. Chicago Junction Ry. Co., 216 Ill. App. 416. The same rule was sustained in Wabash Railroad Co. v. Jones, 163 Ill. 167, and in numerous other cases in the reviewing courts of this state. Counsel for appellee seems to admit this rule but argues that it does not apply to the present case for the reason that the defendant is not a railroad company and not engaged "in the quasi public business of transporting freight and passengers." The rule seems to be general and not limited to railroad companies only. Gibson v. Leonard, 143 Ill. 182; Casey v. Adams, 234 Ill. 350. No authorities are cited to sustain the theory of a limitation of the rule to railroad companies.

It is also argued that the rule is not applicable in the present case because the defendant was not the owner of the ground where the accident occurred, but was in possession of and using the land under an agreement or license from the Pennsylvania Railroad Company. The recent case of Stedwell v. City of Chicago, 297 Ill. 486, is cited in support of this contention. We have carefully examined the opinion in the Stedwell case and do not find it susceptible of the construction urged on behalf of the appellee herein. It was based upon a state of facts not at all analagous to those involved in the case at bar. In that case a boy was injured by coming in contact with an exposed electric light wire maintained by the city upon an elevated railroad structure which the boy was climbing. The court held that the pillar which the boy was climbing "presented an attraction and allurement to children to climb it in their play." No such

answer the questions of risks and duties (among is another applicable to the case of a minor. Jensen v. Sacrinomento, 164 III. App. 607. It was held by this court that the only duty which a railroad company owes to a minor trespassing upon its right of way is not wilfully and wantonly to inflict an injury. Lotz v. Chicago Junction Ry. Co., 217 Ill. 111, 114. The same rule was enunciated in Wabash Railroad Co. v. Jones, 216 Ill. 167, and in numerous other cases in the reviewing courts of this state. Counsel for appellee cases to which this rule but argues that it does not apply to the present case for the reason that the defendant is not a railroad company and not engaged "in the usual public business of transportation (Ibid. 111 Ill. 114)." The rule cited to be general and not limited to railroad companies only. Gibson v. Leonard, 143 Ill. 182; Dunn v. Adams, 234 Ill. 386. No authorities are cited to sustain the theory of a limitation of the rule to railroad companies.

It is also argued that the rule is not applicable in the present case because the defendant was not the owner of the ground where the accident occurred, but was in possession of and using the land under a agreement or license from the Pennsylvania Railroad Company. The recent case of Kirkwood v. City of Chicago, 297 Ill. 486, is cited in support of this contention. We have carefully examined the opinion in the Kirkwood case and do not find it susceptible of the construction urged on behalf of the appellee herein. It was based upon a state of facts not at all analogous to those involved in the case at bar. In that case a boy was injured by coming in contact with an exposed electric light wire maintained by the city upon an elevated railroad structure which the boy was climbing. The court held that the place which the boy was climbing "possessed no attraction and allurement to children to climb it in their play." No such

attraction is involved in the case at bar. The court held that the city was liable, being responsible for creating the dangerous condition whereby a child in yielding to the allurement of an attractive thing is brought in contact with a danger and is injured. The decision properly holds that the child was not a trespasser in so far as the city was concerned. Without indulging in further analysis and comparison, it is obvious that the rule established in the Stedwell case is not applicable to the case at bar.

We are of the opinion that the defendant owed no duty of care towards the plaintiff and was not guilty of any negligence which caused the injury to the plaintiff and that no evidence of wanton or wilful conduct is contained in the record. It follows that the plaintiff had no right of recovery against defendant. Entertaining these views, it is unnecessary for us to consider the remaining grounds urged in appellant's brief, for a reversal of the judgment.

The judgment of the Circuit Court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Gridley, P. J., and Barnes, J., concur.

attraction is involved in the case at bar. The court held that the city was liable, being responsible for creating the dangerous condition thereby a child in yielding to the allurement of an attractive thing is brought in contact with a danger and is injured. The decision properly holds that the child was not a trespasser or in the city was negligent. Without indulging in further analysis and comparison, it is obvious that the rule established in the Kirkendall case is not applicable to the case at bar.

We are of the opinion that the defendant owed no duty of care towards the plaintiff and was not guilty of any negligence which caused the injury to the plaintiff and that no evidence of wanton or willful conduct is contained in the record. It follows that the plaintiff has no right of recovery against defendant. Under-lining these views, it is unnecessary for us to consider the remaining grounds urged in appellant's brief, for a reversal of the judgment.

The judgment of the Circuit Court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Gridley, J., and Jones, J., concur.

218 - 26391

FINDING OF FACTS.

The court finds as ultimate facts in this case that the appellant was not guilty of the negligence charged in the declaration and was not guilty of wanton or wilful conduct in injuring the plaintiff.

245 - 26418

ROSA BLUMENTHAL,
Appellee,

vs.

HARRY DAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 635

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The appellee, who was plaintiff in the Municipal Court, brought an action of forcible detainer against the defendant, who is the appellant here, to recover possession of the store and basement located at 805 Maxwell street, Chicago. The case was tried before the court and a jury and at the close of all the evidence the court instructed the jury to return a verdict for the plaintiff, which was done. Thereafter a motion for a new trial and a motion in arrest of judgment were denied and judgment for possession was entered. A reversal of that judgment is sought in this court.

The evidence shows that the premises in question were occupied by one N. N. Bolotin originally under an oral lease but that on April 25, 1919, he received a written lease of the premises from the then owners, Meyer Brothers, which was executed on behalf of the lessor by one Goldstein, their agent. On or about September 1, 1919, the plaintiff purchased the premises in question and received from Meyer Brothers an assignment of the lessor's interest in the lease in question. The defendant, Dan, originally sublet a portion of the premises from Bolotin and carried on at first a delicatessen business and afterwards conducted a meat market therein. In June, 1919, Bolotin sold to Dan all of his fixtures in the store for the sum of $290 and thereafter retained only desk room in the

premises. The defendant claims that at this time he also purchased from Bolotin his interest under the lease. No written assignment of the lease was ever made. On April 22, 1920, Bolotin moved out of the premises and on April 25, 1920, entered into an agreement with the plaintiff whereby the lease of April 25, 1919, was surrendered and cancelled. This agreement was in writing and had an affidavit attached to it, executed by Bolotin, in which he alleges among other things that he was in possession of the demised premises until April 22, 1920, and on that date Dan took possession of the premises by virtue of a tenancy from month to month. On April 26, 1920, the plaintiff served a thirty day notice upon Dan terminating the tenancy. No objection is made to this notice except on account of its alleged insufficiency. It is claimed by the defendant that he was an oral assignee of the lease of April 25, 1919, which could be terminated only upon a ninety day notice.

We are of the opinion that there was no valid assignment of the lease of April 25, 1919, from Bolotin to Dan. Any attempted oral assignment of the lease, if there was one, would have been invalid. Chicago Attachment Co. v. Davis & Co., 147 Ill. 121. We are further of the opinion that no error was committed by the Municipal Court in instructing the jury to return a verdict for the plaintiff.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

premises. The defendant claims that at this time he was prevented from taking his interest under the lease, by virtue assignment of the lease was over made. On April 26, 1920, Dolphin moved out of the premises and on April 30, 1920, entered into an agreement with the plaintiff whereby the lease of April 26, 1910, was surrendered and cancelled. This agreement was in writing and had an affidavit attached to it, executed by Dolphin, in which he alleges among other things that he was in possession of the demised premises until April 30, 1920, and on that date Dun took possession of the premises by virtue of a tenancy from week to month. On April 30, 1920, the plaintiff served a thirty day notice upon Dun terminating the tenancy. We submission is made to this notice except on account of its alleged indefiniteness. It is claimed by the defendant that he was an equal partner of the lease of April 26, 1910, which could be terminated only upon a ninety day notice.

We are of the opinion that there was no valid assignment of the lease of April 30, 1910, from Dolphin to Dun. Any attempted oral assignment of the lease, if there was one, would have been invalid. Tilden Advertisement Co. v. Gerke et al. 2. 144 Ill. 388. We are further of the opinion that no error was committed by the municipal court in instructing the jury to return a verdict for the plaintiff.

The judgment of the municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

282 - 26456

BERNSTEIN FURNITURE COMPANY,
a corporation,
Appellant,

vs.

MRS. TERRENCE BANNON,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 635

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This was an action of replevin brought by the plaintiff, who is appellant here, to recover possession of a certain refrigerator and a certain couch and mattress alleged to be unlawfully withheld from it by the defendant, who is the appellee here. The case was tried in the Municipal Court without a jury and resulted in a finding and judgment of the court that the right to the possession of the refrigerator was not in plaintiff and that the right to the possession of the couch and mattress was in the plaintiff, and judgment was entered accordingly. No brief is filed on behalf of the appellee.

The evidence shows that on December 15, 1919, the defendant executed a certain instrument which is described as a chattel mortgage, although not acknowledged and recorded in conformity with the statute. By this instrument she sold to the plaintiff the articles mentioned for $37.75. The instrument recites in substance that "this mortgage" shall be void upon payment of the note of the maker for $37.75 to the plaintiff in twelve equal installments of $3 each on the 15th and 29th day of each month thereafter and $1.75 three years after date. It further provided that the defendant should have possession of said property until default in payment or a removal or sale thereof or any part thereof without the written consent of the

plaintiff and that in any of which events the plaintiff should have the right to take and sell such goods at public or private sale to the highest bidder with or without notice. The defendant also executed a note of even date with said instrument for $37.75 payable as above stated. Default was made in the payment of the note.

Undoubtedly the plaintiff had a right to maintain a suit for the recovery of the articles in question. It seems to have been the theory of the defendant that she had made payments to the defendant nearly, if not wholly, equal to the purchase price of the refrigerator and that she was therefore entitled to hold the same. It is impossible to reconcile the accounts between the plaintiff and defendant, as there appear to have been other transactions between them and numerous small payments made without reference to the terms of the note and the so-called mortgage.

The transaction shown by the note and the instrument of December 15, 1919, was an entirety, and we know of no theory under which the defendant could properly claim a release of the refrigerator, which was a part of the security pledged for the payment of the note of $37.75. The person who desires to rescind a contract must rescind the same in its entirety and return the entire consideration or tender a return of the same as a condition precedent to the rescision. Mitchell v. Mitchell, 267 Ill., 169. The plaintiff was clearly entitled to the return of the refrigerator as well as of the couch and mattress.

The judgment of the Municipal Court is reversed and the case remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

plaintiff and that in any of which events the plaintiff should have the right to take and sell such goods at public or private sale to the highest bidder with or without notice. The defendant also executed a note of even date with said instrument for $27.72 payable as above stated. Default was made in the payment of the note.

Immediately the plaintiff had a right to maintain a suit for the recovery of the articles in question. It seems to have been the theory of the defendant that she had made payments to the defendant hereby, at not which, that the purchase price of the refrigerator and that she by therefore entitled to hold the same. It is impossible to reconcile the accounts between the plaintiff and defendant, as there appear to have been other transactions between them and numerous small payments made without reference to the terms of the note and the so-called mortgage.

The transaction shown by the note and the instrument of December 15, 1919, was an entirety, and no knowledge of the theory under which the defendant could properly claim a release of the refrigerator, which was a part of the security pledged for the payment of the note of $27.72. The person who desires to rescind a contract must restore the same in its entirety and return the entire consideration or tender a return of the same as a condition precedent to the rescission. Kimball v. Kimball, 77 Ill. 547. The plaintiff was clearly entitled to the return of the refrigerator as well as of the couch and mattress.

The judgment of the municipal Court is reversed and the case remanded.

REVERSED AND REMANDED.

Brady, P. J., and Barnes, J., concur.

312 - 26486

LOUIS BLOOM, a Minor, by Morris Bloom, his Father and Next Friend,
Appellee,

vs.

MICHAEL BOTTIGLIERO,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

222 I.A. 635

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

In this case judgment was rendered by the Superior Court of Cook County against the defendant, Michael Bottigliero, for $7,000 and costs on June 18, 1920. An appeal was prayed and allowed to this court on filing an appeal bond in the sum of $8,000 within thirty days from that date and the defendant was allowed ninety days within which to file a bill of exceptions. The appeal bond was filed within the time indicated and on September 17, 1920, the parties entered into a stipulation whereby the time for filing a bill of exceptions was extended for ten days, which expired on September 27, 1920. On September 28, 1920, the court entered an order extending the time for filing the bill of exceptions to that date and on the same date the bill of exceptions was signed and filed. A motion to strike the bill of exceptions from the transcript of record of the Superior court was filed in this court on February 14, 1921, and on February 15, 1921, the motion was reserved until the final hearing of the case.

It is apparent from the foregoing statement that the bill of exceptions was not presented for the signature and seal of the judge during the term at which judgment was entered or within such further time as was limited by the court by an order entered during that term. It is also apparent that the court did not enter any order extending the time within which the bill of exceptions might be filed prior to the expiration

of the ten days which had been previously allowed by stipulation. Under these circumstances it must be held that the court was without jurisdiction to make the order of September 28, 1920, extending the time for filing the bill of exceptions to that date and that the court had no power to sign an order to file the bill of exceptions on September 28, 1920. The law upon this subject has been stated by the Supreme Court of this state in Pieser v. Minkota Milling Co., 222 Ill. 142, in the following language:

> "From an examination of the authorities we conclude that the rule in this State in reference to the presentation of a bill of exceptions is this: It must be presented for signature and seal during the term at which the cause is disposed of, or within such further time as shall be limited by the court by an order entered during that term, provided, however, that if the court shall be in session at any succeeding term before the expiration of such further time, the court may, prior to the expiration of that further time and during such succeeding term, make another order extending the time within which the bill of exceptions may be filed; but if the term at which the cause was disposed of is adjourned, and thereafter the period first fixed for filing the bill expires without an order providing for an extension being made, the court, subsequent to the expiration of that period, is without jurisdiction to make an order extending the time within which the bill may be presented. United States Life Ins. Co. v. Shattuck, 159 Ill., 610; Hill v. City of Chicago, 218 Ill., 178."

On October 1, 1920, there was a stipulation between the parties by their respective attorneys whereby the original bill of exceptions was incorporated in the transcript of record in lieu of a copy thereof for use in the Appellate or Supreme Court of Illinois on appeal or writ of error. In and by this stipulation the plaintiff reserved to himself all right of objection to said bill of exceptions and to the time or manner of signing, settling or filing thereof and of every kind and nature, whether of form, time or substance, and the right to raise objections in the Appellate Court or in the Supreme Court, and that none of said matters of objection should be deemed waived by the plaintiff by the signing of said stipulation. It is contended by

of the ten days which had been previously allowed by stipulation. Under these circumstances it must be held that the court was without jurisdiction to make the order of September 28, 1970, extending the time for filing the bill of exceptions to that date and that the court had no power to sign an order to file the bill of exceptions on September 28, 1970. The law upon this subject has been stated by the Supreme Court of this state in Fiser v. Kinkade Milling Co., 209 Ill. 142, in the following language:

> "Upon an examination of the authorities we conclude that the rule in this State in reference to the presentation of a bill of exceptions is this: It must be presented for signature and seal during the term at which the cause is disposed of, or within such further time as shall be limited by the court by an order entered during that term, provided, however, that if the court shall be in session at any succeeding term before the expiration of such further time, the court may, prior to the expiration of that further time and during such succeeding term, make another order extending the time within which the bill of exceptions may be filed; but if the term at which the cause was disposed of is adjourned, and thereafter the period fixed for filing the bill expires without an order providing for an extension being made, the court, subsequent to the expiration of that period, is without jurisdiction to make an order extending the time within which the bill may be presented. United States Fire Ins. Co. v. Dunham, 167 Ill. 41; Hill v. City of Chicago, 218 Ill. 17."

On October 1, 1970, there was a stipulation between the parties by their respective attorneys whereby the original bill of exceptions was incorporated in the transcript of record in lieu of a copy thereof for use in the Appellate or Supreme Court of Illinois on appeal or writ of error. In and by this stipulation the plaintiff reserved to himself all rights of objection to said bill of exceptions and to the time or manner of signing, settling or filing thereof or of error that may arise therefrom, whether of form, time or substance, and the right to raise objections in the Appellate Court or in the Supreme Court, and that none of said matters of objection should be deemed waived by the plaintiff by the signing of said stipulation. It is contended

the appellant that if the bill of exceptions was not signed and sealed according to law, an objection should have been entered at the time, citing Myers v. Phillips, 68 Ill. 269, and Village of Hyde Park v. Dunham, 85 Ill. 569. It is apparent from the terms of the stipulation that appellee was present in court when the bill of exceptions was signed and sealed by the trial judge and objected to the action of the court in so doing. Otherwise the reservations contained in the stipulation of October 1, 1921, are without force or meaning. It cannot be contended that appellee intended to waive the default in filing the bill of exceptions within the time covered by the previous order of court. The case of Benson v. Fitzgerald, 148 Ill. App. 388, cited by appellant as tending to sustain the theory of such a waiver, does not sustain the contention of appellant in that respect. On September 28, 1920, the date of signing and filing the bill of exceptions, the Superior court had lost jurisdiction in this case and its act in signing the bill of exceptions was a nullity. Hill v. City of Chicago, 218 Ill. 178. The motion to strike the bill of exceptions from the transcript of record is allowed.

It follows from the fact that all assignments of error filed in this court being based upon matters contained in the bill of exceptions and not upon anything contained in the common law record and the bill of exceptions having been stricken, the judgment of the Superior court must be affirmed. People v. Rosenwald, 266 Ill. 556.

The judgment of the Superior court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

the appellant that if the bill of exceptions was not signed and sealed according to law, an objection should have been entered at the time, citing Ryan v. Dobbins, 80 Ill. 90, and Wabash, St. Louis & Pacific Ry. v. Bunten, 88 Ill. 489. It is apparent from the terms of the stipulation that qualifies was present in court when the bill of exceptions was signed and sealed by the trial judge and objected to the action of the court in so doing. Observing the observations contained in the stipulation of October 1, 1902, one without doubt or question. It is not intended that counsel intended to waive the default in filing the bill of exceptions within the time fixed by the written order of court. The case of Dunne v. Kitzmiller, 181 Ill. 4[illegible], cited by counsel or lawyer in support of his motion, is not material to the question in this case. In discussion of the [illegible] the Supreme Court [illegible] the [illegible] in the case then in hand [illegible] the [illegible] motion. Bill v. Bill et al. Estate, 249 Ill. 174. The motion to strike the bill of exceptions from the [illegible] is hereby allowed.

It follows from the fact that all questions of error filed in this court being based upon matters contained in the bill of exceptions and not upon anything appearing in the common law record and the bill of exceptions having been stricken, the judgment in the [illegible] case is affirmed. Chicago v. [illegible] wald, 285 Ill. 556.

The judgment of the Superior Court is affirmed.

AFFIRMED.

[illegible], J., [illegible] [illegible].

319 - 26493

C. FRANK CLASS,
Appellee,

vs.

FRANK C. LEWIN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Action was brought in the Municipal Court by appellee to recover from the defendant, who is appellant here, for merchandise sold and delivered to one Fitzgerald to be used on a job which Fitzgerald was doing for the defendant at the Penn Harris Hotel at Harrisburg, Pennsylvania. The statement of claim alleges that the defendant sold and delivered to Fitzgerald merchandise to be used on a job which Fitzgerald was doing at said hotel at agreed prices and at a fair and reasonable value of $792; that Fitzgerald was engaged in furnishing labor and materials for the defendant on this job and that in consideration of Fitzgerald agreeing to furnish the materials and perform the services for the sum of $4,800, defendant agreed to pay all obligations of Fitzgerald on the job and that the merchandise sold by plaintiff to Fitzgerald is one of the obligations on this particular job. The affidavit of merits alleges that the defendant did not purchase the merchandise mentioned and did not agree to pay the obligations of Fitzgerald. It is not denied that the merchandise was furnished to Fitzgerald as alleged and that the value of the same was $792.

The evidence shows that the defendant was a contractor engaged in the erection of the Penn Harris Hotel at Harrisburg, Pennsylvania. On August 7, 1917, he entered into a written contract with J. C. Fitzgerald whereby the latter agreed to furnish all labor and materials for the lathing and plastering required

Frank Lemmo, appellee,	
vs.	municipal court
Frank Fitzgerald, appellant.	of chicago.

MR. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

Action was brought in the Municipal Court by appellee to recover from the defendant, who is appellant here, for merchandise sold and delivered to one Fitzgerald to be used on a job which Fitzgerald was doing for the defendant at the Sears Roebuck Metal at Northbrook, Pennsylvania. The statement of claim alleges that the defendant sold and delivered to Fitzgerald merchandise to be used on a job which Fitzgerald was doing at said hotel at agreed prices and at a fair and reasonable value of $750; that Fitzgerald was engaged in furnishing labor and materials for the defendant on this job and that in consideration of Fitzgerald agreeing to furnish the materials and perform the services for the sum of $4,800, defendant agreed to pay all obligations of Fitzgerald on the job and that the merchandise sold by plaintiff to Fitzgerald is one of the obligations on this particular job. The affidavit of merits alleges that the defendant did not purchase the merchandise mentioned and did not agree to pay the obligations of Fitzgerald. It is not denied that the merchandise was furnished to Fitzgerald as alleged and that the value of the same was $750.

The evidence shows that the defendant was a contractor engaged in the erection of the Sears Roebuck Metal at Northbrook, Pennsylvania. On August 7, 1927, he entered into a written contract with J. J. Fitzgerald whereby the latter agreed to furnish all labor and materials for the roofing and plastering required

for the erection and completion of the hotel building for the sum of $32,650. Some months later an agreement was made between the defendant and Fitzgerald whereby the latter agreed to furnish the materials and do the lathing upon the ballroom of said hotel for the sum of $5,250. This latter agreement was oral and its existence and the price agreed to be paid for the ballroom work was established by a letter from the defendant to Fitzgerald dated August 21, 1918. This is apparently the agreement to which reference is made in the statement of claim. The materials furnished by the plaintiff are said to have been used on the ballroom job.

The evidence further shows that as the work proceeded the defendant advanced to Fitzgerald sundry amounts needed for the payment of his payroll and paid sundry bills for materials which the defendant had previously agreed to pay and in some cases had guaranteed. Fitzgerald testified that in October, 1918, he had a conversation with the defendant wherein he told the defendant in substance that he could not afford to complete the job unless the defendant gave him some assurances that the defendant would pay these bills and that the defendant then told him to finish up the job and that after he got through he would pay these bills, presumably referring to material bills, and give Fitzgerald four or five hundred dollars for his personal use. The defendant denies specifically that he ever had any such conversation with Fitzgerald or ever made any such promise. This testimony of the defendant is corroborated to a considerable extent by oral and documentary evidence. The defendant admits that he paid sundry bills for material and advanced money for the payrolls, but says that in the case of every material bill he had previously promised

for the erection and completion of the hotel building for the sum of $28,000. Some months later an agreement was made between the defendant and Fitzgerald whereby the latter agreed to furnish the materials and do the labour upon the building of said hotel for the sum of $3,250. This latter agreement was duly and in existence and the price agreed to be paid for the building work successfully completed by a letter from the defendant to Fitzgerald dated August 21, 1914. This is apparently the agreement to which reference is made in the statement of claim. The materials furnished by the plaintiff are said to have been used on the building.

The evidence further shows that as the work proceeded the defendant advanced to Fitzgerald sundry amounts needed for the payment of his payroll and small sundry bills for materials which the defendant had previously agreed to pay and in some cases had guaranteed. Fitzgerald testified that in October, 1914, he had a conversation with the defendant wherein he told the defendant in substance that he could not afford to complete the job unless the defendant gave him some assurances that the defendant would pay those bills and that the defendant then told him to finish up the job and that after he got through he would pay those bills, presumably referring to Fitzgerald's bills, and give Fitzgerald two or five hundred dollars for his personal use. The defendant denies specifically that he ever had any such conversation with Fitzgerald or ever made any such promise. This testimony of the defendant is corroborated to a considerable extent by oral and documentary evidence. The defendant admits that he did sundry bills for material and advanced money for the payroll, but says that in the case of some material bill he had previously guaranteed

the material men to pay the bills, and in all cases the amount of the bills so paid seems to have been charged against Fitzgerald's account, in conformity with the usual procedure in such cases.

The appellant contends that there was no contractual relation between himself and the appellee; that the evidence of the parol agreement with Fitzgerald was improperly admitted, and that such parol agreement was an attempt to modify an executory contract under seal by an executory parol agreement, for which there was no consideration, and that there was no competent evidence to sustain the finding in favor of the appellee. The judgment in the case seems to have been based upon the theory that the plaintiff had a right to recover upon the alleged agreement of the defendant made with Fitzgerald to pay the material bills in conformity with the conversation held in October, 1919, and that this agreement, assuming the same to have been made, was for the benefit of a third party, whose rights can be enforced by a suit in his own name regardless of the fact that said third party was not named in the contract.

While it is true that a contract between two parties for the benefit of a third party may be enforced by such third party by a suit in his own name, even though the third party is not named in the contract, (White v. C. P. & St. L. Ry. Co., 196 Ill. App., 459), yet it is also true that the right of the third party to maintain such an action exists only when the agreement is primarily for his benefit. The cases cited by appellee in support of the proposition that the plaintiff could maintain this suit on the ground that he is a third party, for whose benefit a contract had been made, in every instance disclose a state of facts from which it is apparent that the contract in question had been made primarily for the benefit of

the material men to pay the bills, and in all cases the amount of the bills so paid seems to have been charged against Fitzgerald's accounts, in conformity with the usual procedure in such cases.

The appellant contends that there was no contractual relation between himself and the appellee; that the evidence of the parol agreement with Fitzgerald was incompetent evidence, and that such parol agreement was an attempt to modify an executory contract under seal by an executory parol agreement, for which there was no consideration, and that there was no competent evidence to sustain the finding in favor of the appellee. The judgment in the case seems to have been based upon the theory that the plaintiff had a right to recover upon the alleged agreement of the defendant made with Fitzgerald as any the material bills in connection with the conversation held in October, 1918, and that this agreement, assuming it to have been made, was for the benefit of a third party, whose rights can be enforced by a suit in his own name regardless of the fact that said third party was not named in the contract.

While it is true that a contract between two parties for the benefit of a third party may be enforced by such third party by a suit in his own name, even though the third party is not named in the contract, (White v. L. E. & W. R. Co., 20 Ohio St. 157, 159), yet it is clear that the rights of the third party to maintain such an action exists only when the agreement is primarily for his benefit. The cases cited by appellee in support of the proposition that the plaintiff could maintain this suit on the ground that he is a third party, for whose benefit a contract had been made, in every instance disclosed a state of facts from which it is apparent that the contract in question had been made primarily for the benefit of

the third party and was susceptible of no other construction.

The contract which is relied upon in this case is based upon the alleged conversation between Fitzgerald and Lewin in October, 1918, and seems to us to have been primarily for the benefit of the parties to the conversation, namely, Fitzgerald and Lewin. The plaintiff was a stranger to the contract; he was not a party to it, and if any benefit from it could accrue to him such benefit was merely incidental. The purposes and objects of the contract were not to benefit the plaintiff but to benefit the parties. Crandall v. Irving, 154 Ill., 630. It has been held repeatedly in this state that a bond given to secure the faithful performance of a contract to furnish labor and materials cannot be made the basis of a suit on the part of a third party who has furnished materials in connection with the performance of the contract (Searles v. City of Flora, 225 Ill., 167, and cases cited), for the reason that the bond was furnished solely for the benefit of one of the contracting parties. We do not think that the somewhat doubtful testimony as to the conversation between Fitzgerald and the defendant in October, 1918, was sufficient to establish a direct and explicit obligation of such a character as to permit the plaintiff to maintain an action thereon. It is not every contract made by one person with another from the performance of which a third person will derive a benefit on which said third person may maintain an action. It is not enough that there should be an apparent intent to secure a benefit to some third person, but it must further appear that the contract was made directly and primarily for his benefit. Seefeldt v. Filgen, 193 Ill. App., 315.

We are of the opinion that there was no contract, express or implied, between the parties to this suit, and that

the third party and was unacceptable at no other consideration.

The contract which is relied upon in this case is based upon the alleged conversation between Fitzgerald and Lewis in October, 1956, and seems to us to have been primarily for the benefit of the parties to the conversation, namely, Fitzgerald and Lewis. The plaintiff was a stranger in the transact; he was not a party to it, and if any benefit from it could accrue to him such benefit was merely incidental. The purposes and objects of the contract were not to benefit the plaintiff but to benefit the parties. Cheshire v. Bailey, [1905] XIX., 479. It has been held repeatedly in this state that a bond given to secure the faithful performance of a contract to furnish labor and materials cannot be made the basis of a suit on the part of a third party who has furnished materials in reliance upon the performance of the contract (Hartley v. City of Ithaca, 209 N.Y. 187, and cases cited). For the reason that the bond was furnished solely for the benefit of one of the contracting parties. We do not think that the necessary doubtful evidence as to the conversation between Fitzgerald and the defendant in October, 1956, was sufficient to establish a direct and explicit obligation of such a character as to permit the plaintiff to maintain an action thereon. It is not merely conduct of some by one person with another from the performance of which a third person will derive a benefit on which such third person may maintain an action. It is not enough that there should be an apparent intent to secure a benefit to some third person, but it must further appear that the contracting parties were directly and primarily for his benefit. Lonsdale v. Chesney, 194 N.Y. 1[illegible], 188.

In one of the recent cases there are dictum.

as a matter of law the plaintiff cannot recover upon any contract which may have been made between the defendant and Fitzgerald for the reason that such contract, if made, was for the benefit of the parties thereto and not for the benefit of the plaintiff.

The judgment of the Municipal Court is therefore reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Barnes, J., concur.

328 - 26502

ALFRED SWANSON,
Appellee,

vs.

BOHUMIL KLECKER,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

222 I.A. 636

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Suit was brought in the Superior Court of Cook County by appellee, who was the plaintiff, to recover damages for injuries alleged to have been suffered by him through the negligence of the defendant, who is appellant here. There was a jury trial, which resulted in a verdict and judgment for the plaintiff in the sum of $1700. The declaration originally contained six counts, one of which was dismissed by the plaintiff. Four of the remaining counts alleged in substance that while the plaintiff was about to board a street car at the northeast corner of Montrose and Drake avenues in the City of Chicago he was struck by a motor truck operated by the defendant. These counts also allege that the truck was being operated at a dangerous rate of speed in violation of the statute; that the defendant failed to ring a bell or sound a horn or give any other warning when approaching Drake avenue. The remaining count alleges violation of an ordinance of the City of Chicago which prohibits any person operating a vehicle upon the streets of the City of Chicago upon overtaking any street car which is stopped for the purpose of discharging or taking on passengers from permitting or causing said vehicle to pass or approach within ten feet of the car so long as the same is stopped or remains standing for the purpose of discharging or taking on a passenger or passengers. Pleas of the general issue and of non-ownership of the motor truck were filed by the defendant. The only ground

Suit was brought in the Superior Court of Cook County by appellee, who was the plaintiff, to recover damages for injuries alleged to have been suffered by him through the negligence of the defendant, who is appellant here. There was a jury trial, which resulted in a verdict and judgment for the plaintiff in the sum of $1500. The declaration originally contained six counts, one of which was dismissed by the plaintiff. Four of the remaining counts alleged in substance that while the plaintiff was about to board a street car at the northeast corner of Kenmore and Irvine avenues in the City of Chicago he was struck by a motor truck operated by the defendant. These counts also allege that the truck was being operated at a dangerous rate of speed in violation of the statutes; that the defendant failed to ring a bell or sound a horn or give any other warning that approached that street. The remaining count alleges violation of an ordinance of the City of Chicago which prohibits any person operating a vehicle upon the streets of the City of Chicago upon overtaking any street car which is stopped for the purpose of discharging or taking on passengers from permitting or causing such vehicle to pass or approach within ten feet of the car as long as the same is stopped or remains standing for the purpose of discharging or taking on a passenger or passengers. Pleas of the general issue and of contributory negligence were filed by the defendant. The only witnesses

urged by appellant for the reversal of the case is that the verdict and judgment are contrary to the weight of the evidence and that the plaintiff was guilty of contributory negligence.

The record shows by the testimony of the three witnesses that the appellee was struck and injured by a truck driven by an employe of the appellant at the northeast corner of Montrose and Drake avenues; that prior to the accident the appellee was walking south on Drake avenue and was about to board a westerly bound street car on Montrose avenue, which had stopped at the corner of these two avenues on the east side of Drake avenue for the purpose of taking on or discharging passengers; that just as plaintiff was stepping upon the street car he was struck by the motor truck, which was travelling westward on Montrose avenue in the same direction as that in which the street car was running, and was passing the car at the time of the accident. There is some evidence in the record tending to show that the plaintiff and his companion were not walking southward on Drake avenue prior to the accident but had crossed that street from the southwest corner of the two avenues, passing in front of the car, and were about to board it when plaintiff was struck by the motor truck. In either event, it appears that the motor truck was being operated in violation of the ordinance of the City of Chicago above mentioned.

It is a familiar rule that unless the verdict is clearly and manifestly against the weight of the evidence it will not be set aside and disregarded by a reviewing court, and that where the evidence is conflicting and no error occurs in rulings upon the admissibility of evidence or in the instructions to the jury the verdict of the jury, supported by the judgment of the trial court, will not be disturbed by a reviewing court. Eggmann v. Nutter

urged by appellant for the reversal of the case is that the verdict and judgment are contrary to the weight of the evidence and that the plaintiff was guilty of contributory negligence.

The record shows by the testimony of the three witnesses that the appellee was struck and injured by a truck driven by an employe of the appellant at the northeast corner of Pontiac and Drake avenues; that prior to the accident the appellee was walking south on Drake avenue and was about to board a westerly bound street car on Montrose avenue, which had stopped at the corner of these two avenues on the east side of Drake avenue for the purpose of taking on or discharging passengers; that just as plaintiff was stepping upon the street car he was struck by the motor truck, which was travelling northerly on Drake avenue in the same direction as that in which the street car was running, and was passing the car at the time of the accident. There is some evidence in the record tending to show that the plaintiff and his companion were not walking southward on Drake avenue prior to the accident but had crossed that street from the westward corner of the two avenues, passing in front of the car, and were about to board it when plaintiff was struck by the motor truck. In either event, it appears that the motor truck was being operated in violation of the ordinance of the City of Chicago above mentioned.

It is a familiar rule that unless the verdict is clearly and manifestly against the weight of the evidence it will not be set aside and disregarded by a reviewing court, and that where the evidence is conflicting and no error occurs in ruling upon the admissibility of evidence or in the instructions to the jury the verdict of the jury, supported by the judgment of the trial court, will not be disturbed by a reviewing court. Lemmon v. Butler

169 Ill. App., 116; Piper v. Hendricks, 209 Ill., 564; Hana v. Baldwin, 265 Ill., 119. No complaint is made in the case at bar of errors in admitting or refusing to admit evidence or in instructions given or refused by the court. We are of the opinion that the verdict and judgment are not clearly and manifestly against the weight of the evidence as urged by appellant.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

149 Ill. App., 2d 1. Ellis v. Anderson, 347 Ill., 390; Ill. Cent. R. R. Co. v. Dalton, 237 Ill., 171. In analogy to decisions in this jurisdiction bearing on the question as to what evidence is admissible to show an defendant's negligence in failure to provide a safe place for the employee, it is held that the evidence and judgment not strictly and exactly applicable to the matter of the relevancy of expert opinions.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

Certiorari denied

435 - 25696

RANSOM E. WALKER, Administrator of the Estate of Richard J. Ahrendt, deceased, Appellee, v. SANITARY DISTRICT OF CHICAGO, a municipal corporation, et al, On appeal of SANITARY DISTRICT OF CHICAGO, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

222 I.A. 636

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Ransom E. Walker, as administrator of the estate of Richard J. Ahrendt, deceased, brought suit against the Sanitary District of Chicago and the United States Brewing Company to recover damages claiming that they had negligently caused the death of the deceased. The jury found the Sanitary District guilty and assessed the plaintiff's damages at the sum of $4900. They found the brewing company not guilty. Judgment was entered on the verdict to reverse which the Sanitary District prosecutes this appeal.

There is no substantial controversy as to the facts in the case. The evidence shows that shortly after noon on Saturday, July 19, 1913, a motor truck of the brewing company stopped in front of a saloon on the west side of Western avenue and three doors north of 26th street. Western avenue is a north and south street and is intersected at right angles by 26th street. Another street, Blue Island avenue, crosses the intersection of Western avenue and 26th street diagonally from northeast to southwest. There is a double line of street

car tracks in Western avenue and in Blue Island avenue. Some distance north of where the truck stood the roadway in Western avenue is depressed toward the south where it passes in a subway under railroad tracks. The McCormick Harvester Company's plant, which at that time employed about 5000 men and women, was located at the southeast corner of 26th street and Blue Island avenue. The Kimball Piano Company's plant, which employed about 1500 people, was three blocks west of Western avenue on 26th street. On the day in question, Saturday, the plants closed at noon for a half holiday. The employees were coming from work and boarding street cars for different sections of the city, so that there were a great many people at the intersection of the three streets at the time in question. The brewery truck was standing near the west curb in Western avenue headed south. It was loaded with 30 barrels of beer. The truck and the load weighed about 11 tons. The driver of the truck and his assistants stopped in front of the saloon and delivered some beer. They then went into the saloon to have their lunch. A street car was coming south on the west track in Western avenue and stopped opposite the truck. A large truck belonging to the Sanitary District was coming south in Western avenue behind the street car. Some 20 feet behind the truck and attached to it was a trailer consisting of two wheels and a bolster, and on this truck and trailer were 5 or 6 telegraph poles about 40 feet long. This truck proceeded south and passed between the street car and the brewery truck, and as it did so the trailer came in contact with the brewery truck and the latter started south down the incline along the west curb. A great many people, men, women and children, were in front of the

truck, out in the street, on the sidewalk and at the street intersection. The deceased had just come from his work at the McCormick plant. He was on the west sidewalk some distance south of the brewery truck when he apparently heard the crash and saw the truck start down grade. He ran toward it. At the same time the driver of the truck, who was eating his lunch in the saloon opposite where the truck stopped, also heard the crash and ran out into the street toward the truck, both men endeavoring to stop it. As they came near it they collided. The deceased was thrown down between the wheels of the truck and the curb and was crushed so that he died shortly thereafter.

It is conceded that the law is well settled that if the deceased, at the time he received the fatal injuries, were endeavoring to save human life and did not act rashly or recklessly, he would not be guilty of contributory negligence. West Chicago Street Ry. Co. v. Linderman, 187 Ill.463; Devine v. Pfaelzer, 277 Ill. 254. But the defendant contends that the court should have directed a verdict in its favor for the reason that there was no evidence tending to show that any person was in imminent danger at the time deceased attempted to stop the truck. In support of this it is argued that although a great many persons, men, women and children, were in the path of the truck, yet all of the evidence shows that the truck was moving so slowly that everyone could have gotten out of the way. It is true that when the truck first started it was moving slowly, but it was increasing its speed all the time. It was heavily loaded going down grade, and in these circumstances we think it clear that whether any person was in imminent danger at the time was a proper question to be submitted to the jury. We are further of the opinion that their

finding in favor of the plaintiff is fully warranted by the evidence.

Defendant further contends that the negligence, if any, of the defendant was not the proximate cause of the accident, but that an intervening independent cause was responsible, viz: that the cause of deceased's death was his collision with the driver of the brewery truck which threw him under the wheels of it. In Carlin v. Belt Ry. Co., Gen. No. 25639, Appellate Court, First District, in discussing the question of proximate cause we said: "It is impossible to announce a definition of the phrase 'proximate cause' that will apply to all cases. Of course, general definitions of it can readily be given but most of these are confusing unless the facts of the particular case are kept clearly in mind. It has been held that whether a railroad company is liable for the death or injury of a child who went upon defendant's tracks, not fenced as required by law, and whether if the fence had been constructed as required it would have prevented the child from getting upon the tracks, was a question of fact to be determined by the jury." We there quoted from the case of Keiting v. C. B. & Q. Ry. Co., 252 Ill. 466, where the same question was under consideration, as follows: "'No two cases are precisely alike. In cases involving quite similar facts different courts have arrived at opposite conclusions. The question for our determination is whether there was any evidence requiring the submission of the question of proximate cause to the jury, and if the facts are such that men of ordinary judgment may arrive at different conclusions as to whether or not a fence would have prevented the accident, then the condition was such as required the submission of the case to the jury.'" In Siegel & Cooper v. Troka, 218 Ill.

559, liability was predicated on the faulty construction of an elevator used in a department store. There plaintiff, who was in the elevator, was thrown down by a fellow employe in a playful scuffle and injured. It was contended that the alleged faulty construction was not the proximate cause of the injury but was the result of the scuffle with the other boys in the car. In passing on this question the court said: "If, however, appellant was guilty of the negligence charged in the declaration and without which the injury in question would not have occurred, then it would make no difference as to its liability that some act or agency of some other person or thing also contributed to bring about the result for which damages are claimed. Both or either of the contributing agencies were liable for injury occasioned by their negligence." In considering this question of proximate cause, the court in the case of Shallow v. Kell. Coal Co., 245 Ill.516, said, (pp.519-520): "When an injury proceeds from two causes operating together, the party putting in motion one of them is liable the same as though it was the sole cause. (Bishop on Non-Contract Law, secs.39, 40.) The negligent act or omission must be one of the essential causes producing the injury but need not be the sole cause nor the last or nearest cause. * * * Furthermore, what is the proximate cause is ordinarily a question of fact, to be considered by the jury from all the attending circumstances." To the same effect is Brunnworth v. Morena Cal Co., 260 Ill. 202, where the court said, (p.210): "The rule of common law is, that if an injury result from the negligent act of another, it is no defense that the negligence of a third person or an inevitable accident or some inanimate thing also contributed to cause the

injury, if the negligence charged against the wrongdoer was an efficient cause and without which the injury would not have occurred." From these authorities, we are of the opinion that whether the negligence of the Sanitary District was the proximate cause of the fatal injuries suffered by the deceased was a question offact for the jury.

Complaint is made to the giving of instructions 4, 25, and 14. Instruction 4 was a definition of proximate cause. The objection to it is that it did not limit the recovery to the negligence charged in the declaration. We think the contention is without merit. The instructions taken as a series correctly informed the jury that plaintiff must prove his case as charged in the declaration, and instruction 4 informed the jury what was meant by the phrase "proximate cause". Instruction 25 told the jury that if the deceased was attempting to save the life of any persons who were in danger from the moving truck, he would not be guilty of contributory negligence unless his act was rash or reckless. It is argued that this instruction is wrong for the reason that the deceased would be guilty of contributory negligence unless the danger to the third person was inevitable; that the danger must be certain. We think the law does not require so much, but that the question in such case is whether the deceased at and prior to the time he received the fatal injuries in his attempt to save human life acted as a reasonably prudent man would under all the circumstances. Instruction 14 told the jury that if they believed from the evidence, under the instructions of the court, that the sole cause of the accident was the manner in which the truck of the Sanitary District was driven and managed, then they must

find the brewing company not guilty. This was given at the request of the brewing company. The complaint made against this instruction is that "it is calculated to single out the appellant and the question of its conduct, and to permit the co-defendant to profit at appellant's expense." A further objection is that it was not based on the evidence because the evidence showed that there was another cause that brought about the fatal injuries to the deceased. We think the instruction, if it could be said to be inaccurate, did not prejudice the defendant, for it is clear, upon reading all of the instructions as a series, that the jury clearly understood the issues before them.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

TAYLOR AND THOMSON, J.J. CONCUR.

81 - 25351

DONALD WONG, by WONG SAM, his father and next friend, Appellee,	
v.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
ATLAS TAXICAB COMPANY, a corporation, Appellant.	222 I.A. 636

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, by his next friend, brought suit against the defendant to recover damages for personal injuries. On the first trial of the case the jury disagreed. There was another trial and a verdict in plaintiff's favor for $[illegible]. Plaintiff remitted $100 and a judgment was entered for $400 to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff, a boy eight years old, as he was crossing Harrison street was struck by a taxicab owned and operated by the defendant company.

Plaintiff's position is that he was in the exercise of due care and caution for his own safety and that the defendant negligently ran into him with the taxicab. On the other hand, defendant's position is that the evidence fails to show that it owned and operated the cab in question, and that the manifest weight of the evidence is to the effect that plaintiff ran in front of the cab nearly midway between Clark

and Federal streets; that the driver of the cab did everything he could to avoid the accident but was unable to do so.

Without discussing the evidence, we think it was clearly sufficient to warrant the jury in finding that the taxicab was owned and operated at the time by the defendant.

Plaintiff testified that he lived with his parents on the east side of Clark street north of Harrison street; that about one o'clock in the afternoon of April 14, 1917, he started for the Jones School, which was east of Clark on the South side of Harrison street; that he walked south on the east side of Clark street and turned east on the north sidewalk of Harrison street until he came to the next north and south street which was Federal street; that he stood on the northwest corner of the intersection of the two streets and saw the cab in question coming west in Harrison street; that when it reached the east side of Federal street it stopped; that he then walked out into the street and as he was crossing the north or westbound street car track he was struck by the cab and injured. He further testified that there was another boy with him but that the other boy crossed Harrison street some distance west of Federal street; that this boy at the time of the trial was living in Cleveland, O. This was all the testimony offered on behalf of the plaintiff as to how the accident happened.

For the defendant, John F. O'Malley testified that he was a bookkeeper and had been a reporter for the City News Bureau; that he was walking east on the south sidewalk of Harrison street just west of a north and south alley mid-

way between Clark and Federal streets; that he did not actually see the boy struck, but the first thing he saw was the boy under the cab; that at that time the cab and the boy were about 10 feet west of the alley and that the cab was headed in the westbound street car track; that he went out into the street, took the boy from under the cab, placed him in it and together with another witness, Strudemann, and the driver took him to the Harrison Street Police Station for first aid. Charles Strudemann, an electrotyper, testified for the defendant that he was walking east on the south sidewalk of Harrison street just east of the alley; that there were several teams and wagons standing at the north curb of Harrison street on both sides of the alley, facing west; that the plaintiff ran out from between two wagons into the path of the taxicab, which at that time was only a few feet away from him; that he was thrown down and the witness assisted O'Malley and the driver in taking him to the police station for medical aid and attention. The witness Golem, for the defendant, testified that he was a cab driver and owned his own cab; that he was driving west on Harrison street just behind and a little to the north of defendant's cab; that he saw the plaintiff run out from between a team of horses and the tail-end of a wagon, standing at the north curb, in front of the defendant's taxicab. The evidence is also to the effect that the cab was stopped within a very few feet and there is no claim that there was any negligence in this regard. But the inference plaintiff seems to draw is that the boy who ran out from between the wagons standing at the curb was not the plaintiff but the boy that had since moved to Cleveland. We think there is no evidence to sustain this contention, and that it is clear that plaintiff was the one who ran out from between the wagons.

We think the verdict of the jury is clearly and manifestly against the weight of the evidence. The witnesses for the defendant were in no way connected with it but appear, without dispute, to have been intelligent and fair men. Even if we assume that plaintiff's version of the matter, which is supported only by his own testimony, is correct, yet we think that no recovery could be had for it shows that plaintiff was guilty of contributory negligence. There is no claim made that the cab was traveling at an excessive rate of speed or that the driver did not stop the cab when he discovered the boy. So far as the evidence shows there was nothing else in the street at the time except the two cabs traveling west and the wagons standing at the north curb. The plaintiff testified that he saw the cab on the east side of Federal street and that it was then stopped. In these circumstances we think it clear that on his own version of the case no recovery could be had, for it shows that he was not in the exercise of that degree of care for his own safety which the law requires.

Although the point was not made in the trial court nor in this court, we find that plaintiff's father testified that he had expended $225 for doctor's bills in endeavoring to cure plaintiff of his injuries. Of course, this could not be recovered in an action by the plaintiff. C. & A. R. R. Co. v. Lannet, 12 Ill. App. 408; Burke v. Ellis, 105 Conn. 7[illegible]; 2 Thompson on Negligence, 1260.

The judgment will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Finding of Fact: We find as ultimate facts that plaintiff was

not in the exercise of ordinary care for his own safety at the time of the accident as alleged in his statement of claim, but was, on the contrary, guilty of contributory negligence. We further find that defendant was guilty of no negligence in the operation and management of the taxi-cab.

THOMSON and TAYLOR, J.J. CONCUR.

125 - 25896

WALTER B. CREIGHTON, Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT, COOK COUNTY
DOROTHY H. CREIGHTON, Appellant.	)	

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Walter B. Creighton filed a bill for divorce against his wife, Dorothy H. Creighton, wherein he alleged that he had treated her kindly and affectionately in all things and at all times conducted himself toward her in a manner well becoming a good, true, kind and indulgent husband, and charged that the defendant had been guilty of extreme and repeated cruelty toward him. The defendant answered the bill denying all the material charges. A hearing was had on a decree entered in favor of the complainant and granting a divorce, to reverse which defendant prosecutes this appeal.

The parties were married in December, 1908, and lived in Atlantic City, N.J. Since their marriage there have been three separations. The last one about November, 1917. At that time the complainant left his wife in New Jersey and came to Chicago. There were no children born of the marriage.

Complainant's contention is that he was forced to leave his wife on account of her extreme and repeated cruelty, while her position is that the separation was

brought about through complainant's fault in drinking hard liquor and associating with other women. In his bill he alleged four specific acts of cruelty; (1) that in February, 1913, "in an attempt to kill him or disfigure him for life, she threw carbolic acid in his face"; that in 1915 she attacked him, slapped him in the face, and kicked him in the abdomen"; (3) that on or about September 30, 1916, without provocation "she beat him on the face and body"; (4) that on or about November 5, 1917, she "jabbed a hatpin into his arm and side." There was also a general charge that she had at divers times since their marriage beaten, struck, kicked, choked and otherwise cruelly treated and abused him and threatened his life.

At the time of their marriage complainant was about twenty-one and the defendant eighteen years of age. He was a newspaper reporter in Atlantic City. Her parents bought and paid for most of the furniture when the couple started housekeeping for themselves. And defendant's mother, since the marriage, furnished money to defendant for the purchase of food and clothing. And at other times defendant has been given money for food from complainant's friends. Complainant testified that the first few months of their married life were happy but afterwards on account of defendant's conduct in calling at his place of business and annoying him "his nerves gave way under the strain," and they separated for a time. Indeed there is little contention but that there were a great many altercations and quarrels between them during their married life. Complainant contends that this condition was the result of her annoyance and cruelty while defendant's position is that all these

difficulties were the result of his drinking and association with other women.

As to the specific charges of cruelty made by complainant he testified that in February, 1913, they had a violent quarrel; that she had a small vial of carbolic acid and threw it in his face; that it burned and ran down the side of his face; that the cause of this trouble was that there was "no money for food and the things we ought to have in life." The defendant specifically denied that she threw the carbolic acid and there is no claim that there was any disfigurement or any medical attention required. There was no corroboration of complainant's testimony on this point. As to the second act of cruelty charged, he testified that she repeatedly struck and scratched him. This she also denied and there is no corroboration of his testimony as to this, nor is there any claim that he was in any way seriously injured or in danger of being so injured. Complainant further testified that on or about September 30, 1916, she came up behind him at his place of business and struck him a blow alongside of the face, and that prior to the time the blow was struck no words had passed between them. This was corroborated by the then employee of complainant but he testified that the blow was struck after a heated argument and that complainant took hold of defendant and pushed her out of doors. As to the fourth charge complainant testified that he was acting as an election official and that his wife came to the polling place, demanded money for food, which he said he did not have, and after some words she stuck him in the arm with a hatpin. This was corroborated by another witness as well as by the defendant herself, although she claims she simply jabbed the hatpin in his sleeve. There is no con-

tention that he was injured to any extent nor is the evidence at all clear that his arm was actually pierced by the pin. Complainant testified to other acts of cruelty on the part of his wife; that at one time after he had left their apartment his wife called him back in a loud voice; that he went back and just as the door was opened his wife struck him with a milk bottle cutting his eyebrow so that it bled and left a mark. This was denied by the wife, her testimony being to the effect that the scar was the result of a fight complainant had in Atlantic City with one Swartz. Her testimony was corroborated to some extent by Swartz. Other acts of cruelty were testified to and there can be no doubt that there was considerable trouble between the parties. Complainant was apparently a strong vigorous man weighing about 143 pounds and had played football. She was also apparently a strong healthy woman weighing about 150 pounds. None of the injuries which he contends were inflicted upon him by his wife were of a very serious nature, nor is there any contention that he was not at all times able to protect and defend himself. She denies striking him except when he attacked her first. Several witnesses for the defendant testified that complainant had struck her on a number of occasions, and evidence was introduced on behalf of defendant strongly tending to support her contention that he was unduly intimate with other women and that this was the primary cause of all of the trouble. She does not want a divorce but testified that she again wants to live with him as his wife. The Supreme Court of this State in the case of Trenchard v. Trenchard, 245 Ill. 313, held that extreme and repeated cruelty, as those terms are used in the Divorce Act, mean physical acts of violence amounting to bodily harm such as endangers life or limb, or such acts as raise a reasonable

apprehension of bodily harm and creates a state of personal danger incompatible with the marriage state. That bad temper and petulance of manner are not sufficient grounds for divorce for extreme and repeatedly cruelty. In Garrett v. Garrett, 252 Ill. 318, the court said, (p. 322): "It is a settled law that divorce is a remedy provided only for an innocent party, and when each party has cause for divorce against the other of the same statutory character neither can be granted a divorce; that a defendant charged with extreme and repeated cruelty may show in defense that the complainant was equally cruel. Lubersteln v. Lubersteln, 171 Ill. 333.) It has, however, always been the rule in this State that while the general principles of law are the same whether the suit be instituted by the husband or wife, in the application of these principles it is necessary to consider the relative rights which the marriage has created, the physical constitutions and temperaments of the parties, and that it must be a clear case which will induce the court to grant a divorce on the application of the husband for the cruelty of the wife. (DeLaMay v. DeLaMay, 81 Ill. 251) It is not sufficient to show slight acts of violence on her part towards him, so long as there is no reason to suppose that he will not be able to protect himself by the exercise of his marital powers. . . The mere violence of the wife from which the husband can easily protect himself is not cruelty. The husband may protect himself by using necessary force, but he must not retaliate by giving blow for blow."

When this case went to trial complainant and another witness testified in his behalf in open court and the sole witness produced by defendant was herself. After these three

had testified the court continued the case and the other witnesses all testified by deposition, so that we are in as good a position as was the trial judge to determine the credibility of all the witnesses except the three. After a careful consideration of all the evidence in the record and in view of the rule laid down in the authority last cited, we are clearly of the opinion that the complainant has not proven such acts of cruelty as would warrant the decree of divorce in his favor. Nor do we believe that he was blameless as he contends. The decree is not warranted by the evidence and it is, therefore, reversed and remanded to the Circuit Court of Cook County with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED WITH DIRECTIONS.

THOMSON AND TAYLOR, JJ. CONCUR.

215 - 25967

CHARLES H. WARNER,

Appellee,

v.

FREDERICK E. CARR, et al.
On appeal of G. FRANK TAYLOR,

Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

222 I.A. 637

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit on a promissory note for $3500 against Frederick E. Carr and G. Frank Taylor seeking to hold them as endorsers of the note. Carr was not served. The jury by their verdict assessed plaintiff's damages against Taylor in the sum of $3500 "plus interest due." Afterwards the court computed the interest and entered judgment for $3990. To reverse which this appeal is prosecuted.

The record discloses that plaintiff, whose place of business was 79 Wall street, New York City, owned the Hotel Warner located at 33rd street and Cottage Grove avenue, Chicago; that it was under the lease to the Carr Hotel Operating Company, a corporation; that Carr was manager of the operating company and that he and Taylor owned all the stock in that company, 150 shares each; that the hotel was not a success financially and on June 7, 1917, Carr was in New York and arranged to have plaintiff loan the company $3500 to enable it to continue in business. This was agreed to by plaintiff on the condition that the note would be endorsed by Carr and Taylor. The note was drawn, endorsed and delivered, and afterwards the

money was turned over to the Operating Company. The note was dated June 9, 1917, due six months after date with interest at the rate of 6% per annum. It was payable to the order of the maker, Carr Hotel Operating Company, and by it endorsed. Carr and Taylor endorsed, and above their names was the following: "We hereby waive any and all notice whatsoever of non-payment, demand and presentation of this note."

The defendant's contentions are: First, that the words quoted were not on the note at the time he endorsed it; that since there was no evidence that the note had been presented to the maker for payment and notice of dishonor given to defendant, he would not be held liable; Second, that on or about August 21 following the delivery of the note it was mutually agreed between the plaintiff and Carr and Taylor that if Taylor would deliver to plaintiff all of the stock of the Carr Hotel Operating Company so that Warner could run the hotel, or at least have something to say in the management of it, that he, Warner, would deliver up and cancel the note.

First. Witnesses forthe plaintiff testified that on June 7, 1917, Carr and Taylor were at plaintiff's place of business in New York City seeking to borrow $1500 from plaintiff so as to enable them to keep the hotel going; that plaintiff agreed to loan the money to the Operating Company provided the company would give its note due in six months, endorsed by Carr and Taylor; that this was agreed to by all parties and thereupon plaintiff's attorney drew up the note in question, but that it was not signed for the reason that it was stated that the hotel company had a rubber stamp in Chicago that was

used to affix its signature to documents; that the attorney wrote on the back of the note the words above quoted and that he explained to Carr and Taylor their legal effect; that the note was then taken by Carr to Chicago where the signature of the company was affixed as maker and those of Carr and Taylor as endorsers; that it was then forwarded to Garner in New York and that the money was subsequently received. Carr did not testify and apparently could not be found. Taylor testified that he was not in New York on June 7, 1917, but that he was in Chicago on that date, and that the first he knew of the note was when it was shown to him in Chicago by Carr on June 9; that Carr explained the situation to him and that Taylor thereupon wrote his name on the back of the note; that the words quoted were not on the note at that time. Evidence in the form of telegrams passing between Carr and himself was also offered by Taylor indicating that Carr was in New York and Taylor in Chicago at the time in question. Two witnesses for the plaintiff and one for the defendant qualified as experts in handwriting. The two for the plaintiff testified that in their opinion the waiver on the back of the note was written before Carr and Taylor endorsed it, while the witness for the defendant testified that in his opinion the waiver was written after such endorsements. We think the evidence strongly tends to show, as contended by Taylor, that he was in Chicago on June 7, the date the note was drawn, but we do not believe that this fact is controlling, for the jury at the request of the plaintiff specifically found that the waiver written on the back of the note was written before Carr and Taylor endorsed it. And upon a careful consideration of all the evidence we are unable to say that such special finding is against the manifest weight of the evidence. But counsel for the defendant argue that even if the waiver was

written before the note was endorsed by Carr and defendant that did not excuse the plaintiff from presenting the note and demanding payment, but that the most that can be said is that the words quoted simply waived notice to the endorsers that the note had not been paid. We think it is unnecessary to pass on this contention since it is admitted that the waiver was sufficient to waive notice of dishonor for the reason that the note on its face is made payable at plaintiff's place of business, viz: 79 Wall Street, New York City. Since the note was held by him all the time it must be presumed that it was at the place where it was made payable, and, therefore, it was not necessary for the plaintiff to do anything further than to have the note on the day it was due at 79 Wall Street, New York City. Sec. 73, Ch. 98, R.S. provides that presentment for payment is made at the proper place if it is presented for payment at the place specified in the instrument. We, therefore, hold that since the note was held by the plaintiff and was payable at his place of business in New York City, no further presentment was necessary, and since notice of non-payment or dishonor was waived the defendant is liable on the note.

Second. The defendant next contends that the court erred in excluding evidence offered by him tending to show that there was an agreement between the plaintiff, through his agent and attorney, and the defendant on August 21, 1917, whereby it was agreed that if Taylor would deliver the 300 shares of stock of the Carr Hotel Operating Company to plaintiff the note would be canceled. The evidence was excluded apparently on the ground that it tended to vary the terms of a written agreement entered into on August 21, between Carr, Taylor, plaintiff's attorney and Taylor's attorney. It

recited that on August 21, 1917, there was transferred to the two attorneys, as trustees, 300 shares of stock of the Carr Hotel Operating Company. It further recited that "said trustees have no personal interest in this stock and hold it as trustees for the benefit of creditors of the Carr Hotel Operating Company, and to enable them to sell the assets of said company or to take such other steps in the premises as to them shall seem best. * * *

"In case there shall be any surplus after the payment of all the debts and obligations of said company, said Rubino (plaintiff's attorney) shall, in his discretion, adjust all matters and differences between the holders of said stock as to the amounts to be paid to them and to which they may be entitled by reason of this stock. In making such adjustment he shall not be necessarily bound to divide the proceeds of said stock in accordance with the number of shares held by the various stockholders but shall take into consideration all circumstances surrounding such transaction." In making the offer of the evidence tending to show that it was agreed on August 21 that the note was to be delivered up and canceled, counsel for defendant stated that the stock was to be delivered so that plaintiff could control the Carr Hotel Operating Company; that the lease was to be assigned so as to get Carr out of the company and install a new manager of the hotel as it was claimed that Carr had mismanaged it; that on the same day Carr was removed as manager and Taylor was elected president and a new manager installed; that "in pursuance of that agreement that stock was turned over to these trustees and it stood in the hands of the trustees waiting for further instructions from the Past until everything was terminated * * * We claim there was no written

agreement whatever relieving them from the payment of this note, but a verbal agreement entered into between Taylor and Rubino, acting for Warner, that if he could get Carr and Taylor to enter into that form of agreement (which we have quoted) and cancel and surrender the stock, that the note will be considered as paid." The offer of this evidence was objected to and excluded on the ground that it was made prior to the execution of the trust agreement, and that it tended to vary the terms of that instrument. We think the ruling of the court was entirely proper. The agreement was drawn up by plaintiff's counsel in the presence of defendant's counsel and if it were understood and agreed that the note was to be delivered up and canceled, it would have been a very simple matter to have stated so in the agreement. The elementary rule of law that excludes all evidence of agreements made prior to or contemporaneous with the execution of a written agreement covering the same subject-matter, we think, renders the offered evidence inadmissible.

Defendant also contends that it was error for the court to compute interest on the amount of the verdict assessing the plaintiff's damages at $3500 "plus interest due". It was a simple matter for the court to compute the interest on the amount from the date of the execution of the note until the date of the verdict. This was entirely proper. There is no complaint that the amount is not properly computed.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, J.J. CONCUR.

230 - 26602

CINCINNATI TIME RECORDER Co., a corporation, Appellee, v. CALUMET COAL AND TRAMING CO., a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 637

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover the purchase price of a cost keeper, card rack and 2000cards. The case was tried before the court without a jury and there was a finding and judgment in plaintiff's favor for the amount of its claim, $84.60, to reverse which defendant prosecutes this appeal.

The record discloses that the defendant conducted a garage at 2364 E. 95th street, Chicago, and that its main office was at 9028 Commercial avenue; that in November, 1918, a representative of plaintiff called on the superintendent of defendant's garage for the purpose of selling him a time clock. It was agreed that the clock should be installed and tried for 30 days. The clock was delivered and installed and on February 2nd following the superintendent of the garage notified plaintiff that the clock was not satisfactory and wanted it removed; that the superintendent had talked the matter over with the president of the defendant company and it was decided to purchase the cost keeper involved in the

instant case; that shortly thereafter plaintiff's representative called at the garage, removed the clock and installed the cost keeper and card rack and delivered the 2000 cards. The defendant having refused to pay this suit was brought.

Plaintiff's contention was that the sale was unconditional, while, on the other hand, defendant's position was that the sale was made upon condition that the cost keeper worked to defendant's satisfaction. During the examination of the witness Meisser, who represented plaintiff in the sale of the articles in question, after questions were asked and answers made, counsel for defendant stated: "I object and move that the question and answer be stricken out." This motion was made several times and always overruled by the court. The witness was then asked who was present and what was said at the conversation between himself and defendant's superintendent, and after the question was answered defendant's counsel moved that the question and answer be stricken, which was overruled. Plaintiff's counsel then asked: "Q. Then what happened? A. I made out a straight order for a cost keeper, our Recorder #24, Mec. #5827, the price of which was $75.00; also for supplies; one single card rack #617 for $5.00 and 2000 cards like sample I showed him 4½ by 8½ at $2.30 per M. amounting to $4.60, at a total of $84.60, and Mr. Donville (defendant's superintendent) signed the order. Mr. Green: (Counsel for defendant) I object and move that the answer be stricken. The Court: Overruled." Counsel for defendant now argue that the answer quoted should have been stricken for the reason that it was not the best evidence of the transaction between the parties, but that the written order was the best evidence and should have been produced or its absence accounted for. No such point was made on the trial

It is obvious that it cannot be made for the first time in this court. The objection should have been specific. It should have been pointed out that the statement of the witness was not the best evidence of the transaction but that the order should have been produced. That course not having been pursued the point cannot be urged here for the first time.

It is also contended that there was no evidence that Mr. Monville, defendant's superintendent, had authority to purchase the goods in question. The evidence shows that he entered into an arrangement whereby the time clock was installed in defendant's garage in November, 1919; that it remained there until the following February when it was removed and that the cost keeper was installed the forepart of February and that a few days thereafter it was seen by defendant's president. The evidence further shows that before the cost keeper was installed Monville stated to plaintiff's representative that he had talked the matter over with defendant's president and that it was decided to purchase the cost keeper. In these circumstances we think it clear that there was sufficient authority in the agent to enter into the agreement as contended by plaintiff.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, J.J. CONCUR.

251 - 26083

CHICAGO & ALTON RAILROAD COMPANY, Appellee,	
v.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
CHICAGO BONDING AND INSURANCE COMPANY, a corp., Appellant.	

222 I. A. 637

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages on a contract of guaranty insurance commonly known as a schedule bond. At the close of all the evidence there was a directed verdict in favor of plaintiff for the amount of its claim, viz: $5067.80, and the case is here on defendant's appeal.

The record discloses that under the provisions of the bond the defendant agreed to reimburse the plaintiff within three months after satisfactory proof of loss had been made for all moneys lost by reason of the dishonesty of plaintiff's employees. Attached to and made a part of the contract was a schedule showing the names of plaintiff's employees together with the amount of the bond applicable to each. One L. W. Doyle was plaintiff's cashier at Bloomington and he had embezzled and converted to his own use moneys belonging to plaintiff aggregating $13,136.34. Upon discovery of this shortage plaintiff notified the defendant and afterwards submitted proof of loss. Payment not having been made this suit followed.

The defendant filed an affidavit of merits setting up the nature of its defense in which it averred that at and before the time of entering into the bond plaintiff knew that Doyle was a defaulter but that it did not disclose this fact to the defendant, but attempted to defraud defendant by concealing the facts from it. A further defense was, as set up in the affidavit of merits, that plaintiff had failed to furnish defendant with satisfactory proof of loss as required by the contract. On the trial no attempt was made to substantiate eitherof these alleged defenses. At the close of plaintiff's evidence the defendant offered in support of its motion for a directed verdict the files in another case in the Municipal Court which purported to be between the same parties and on the same bond. The contention of the defendant was that more than one suit could not be brought on this bond, but that the proper practice was to suggest further breaches of the bond in the first suit and not to institute separate suits. It is contended that this is covered by section 20 of the Practice Act. Counsel for plaintiff contends that section 20 of the Practice Act does not apply except to penal bonds. Section 20 of the Practice Act has nothing to do with bonds of any kind. It provides that cases shall be set and apportioned for such days of the term as the judge may direct, and for the issuance of subpoenas to witnesses, etc. It is clear that counsel for both parties have not correctly designated the section that they probably have in mind. We think they refer to section 35 of the Practice Act which has to do with actions on penal bonds. That section is not applicable to bonds like the one in suit which is conditioned for the payment of money.

Complaint is made to the proof of claim submitted by plaintiff to the defendant on the ground that it was not made by the duly authorized auditor, as defendant's counsel say is required by the bond. We have been unable to find any such provision in the bond. The bond requires proof of loss to be made by a duly authorized officer, and that it should be prima facie evidence of the amount of the claim. The same point was made in another case between the same parties on the same bond, C.& A. R. R. Co. v. Chicago Bonding & Insurance Co., Gen. No. 25667, where another division of this court held the contention unsound. We are entirely satisfied with the reasoning of the court in that opinion. No complaint was made to the proof of the claim until the case was reached for trial and, in these circumstances, it was too late.

Defendant also contends that the judgment is wrong for the reason that the record discloses that plaintiff could have prevented the loss by the exercise of ordinary care and that since this was not done it is not liable. In support of this the case of Whyland v. Chicago Bonding & Insurance Co., 209 Ill. App. 485, is cited. That case is not in point for the contract there made it the duty of the assured to make an examination of its accounts every month. There is no such requirement in the bond in the case before us.

Finding no substantial error in the record the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR AND THOMSON, JJ. CONCUR.

305 - 26077

MANSFIELD H. LUNDBERG, (Plaintiff) v. AARON BODENWEISER, (Defendant)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
AARON BODENWEISER for the use of MANSFIELD H. LUNDBERG, Appellee, v. MARTHA M. BODENWEISER, (Intervener) Appellant.	222 I.A. 637

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

On November 15, 1913, Mansfield H. Lundberg brought suit in the Municipal Court of Chicago against Aaron Bodenweiser on a promissory note for $1,244.63. On April 17, 1914, judgment was taken against the defendant by default, the defendant having failed to file an amended affidavit of merits in accordance with an order of court. On April 24 an execution was issued and placed in the hands of the bailiff, and on July 22, 1914 it was returned, the return showing that he had made a demand for payment by delivering to the defendant's wife a copy of the execution and notifying the defendant that, if he desired to claim exemptions, he should file a schedule. Afterwards on August 3, 1914, the defendant filed a schedule. Nothing further appears to have been done until December 11, 1918 when an affidavit of garnishment was filed and a garnishee summons issued and

summons issued against the South Side State Bank. The bank answered that it had no money in its possession belonging to the defendant and this issue was contested. On October 23, 1919, the case went to trial and, after plaintiff had presented most of his evidence, the defendant's wife, Bertha K. Bodenweiser, by leave of court, intervenes claiming that the money on deposit in the garnishee bank belonged to her. This was the only issue. And after a hearing, the court found that the money in the bank belonged to the defendant and entered judgment against the bank for $3,200.00, the amount of the deposit,- $1,637.67 of thisamount being the amount of the judgment entered against the defendant, together with interest thereon, was for the use of the plaintiff and the balance for the use of the defendant. Mrs. Bodenweiser and the bank have prosecuted separate appeals to this court.

This case is on the appeal of Mrs. Bodenweiser. She makes two points: 1st, That the court was without jurisdiction of the garnishment proceedings in that the record fails to show that the execution was served on Bodenweiser, the defendant, and that the affidavit for the garnishment summons was insufficient; and, 2nd: That the evidence shows that the money in the garnishee bank was her money and not that of her husband, the defendant.

The first point made is not argued and, under repeated decisions of the Supreme Court and this court, we might disregard it for the rule has been reiterated numerous times that a point made in the brief, but not argued, is waived. We think, however, there is no merit in the point. A copy of the execution was delivered to

Mrs. Bodenweiser, a member of the defendant's family. This was in accordance with the provision of Section 2, chapter 52, R. S. which provides that an execution may be served upon the defendant as a summons served in chancery is served. And Section 11 of chapter 22, R.S. provides that a summons in chancery may be served by delivering a copy to a member of the defendant's family of the age of 10 years and upwards and informing such member of the contents thereof. We think the execution and the return, as well as the affidavit for garnishment, were all in accordance with the statute. There is no merit in this point.

The real point of the controversy, however, was, and the contention here made is, that, as between Mr. and Mrs. Bodenweiser, the money in the South Side State Bank clearly belonged to Mrs. Bodenweiser and, therefore, the judgment is wrong. Of course, if counsel's contention, that the money belonged to Mrs. Bodenweiser, is correct, the conclusion he makes is sound. But, after a careful consideration of the evidence we are unable to agree with the conclusion he makes. We think there was ample evidence to sustain the finding of the court that the money belonged to Mr. Bodenweiser. We certainly could not say, under the state of the record, that the finding of the trial judge, who saw and heard the witnesses, was against the manifest weight of the evidence and, under these circumstances, under the law, we should not disturb the judgment.

The evidence shows that Aaron Bodenweiser opened an account with the garnishee bank in the name of the Bo-Beck Co. and he was the only one authorized to sign checks on the bank. The bank did not know Mrs. Bodenweiser,

so far as the account was concerned. The evidence further tends to show that the business of the Bo-Beck Co. was controlled and managed by Aaron Bodenweiser and that his wife had little to do with its affairs; that she never made any contracts for it; never paid any bills, and Aaron Bodenweiser testified that he had made deposits in this account from time to time from moneys of his own. It is true that several days after this evidence was given, when the case was opened up to permit the plaintiff to offer the execution and the return thereof in evidence, Bodenweiser endeavored to correct this statement, but we think his explanation in this regard was, to say the least, very indefinite. On behalf of Mrs. Bodenweiser, evidence was introduced tending to show that it was her money that was placed in the bank, but we think it clear that we would not be warranted in disturbing the finding of the court.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, J.J. CONCUR.

26075

306 - 26075

MANSFIELD H. LUNDBERG,
(Plaintiff)

v.

AARON RODENWEISER,
(Defendant)

AARON RODENWEISER, for use of MANSFIELD H. LUNDBERG,

Appellee,

v.

SOUTH SIDE STATE BANK, a corporation, Garnishee, and BERTHA S. RODENWEISER, intervener,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

222 I.A. 637

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Mansfield H. Lundberg brought suit in the Municipal Court of Chicago against Aaron Rodenweiser and obtained a judgment. An execution was issued and a demand made. The execution was returned no part satisfied. Afterwards garnishment proceedings were instituted and the South Side State Bank served as garnishee. Bertha S. Rodenweiser, the defendant's wife, intervened claiming the money on deposit in the South Side State Bank belonged to her. The controversy in the case was whether the money belonged to defendant or his wife. The court found that the money was the property of defendant and entered judgment accordingly. From this judgment Mrs. Rodenweiser and the bank prosecuted separate appeals to this court. The record is the same in each case. We have

this day filed an opinion in the appeal of Mrs. Bodenweiser, Gen. No. 26077, wherein we state our reasons why the judgment should be affirmed.

For the reasons stated in that opinion the judgment of the Municipal Court is affirmed.

AFFIRMED.

THOMSON AND TAYLOR, JJ. CONCUR.

se No. 18292] 26078

3M 2-13-21

Garnishment against [illegible] wife of the judgment debtor [illegible] claiming the fund. Judgment for plaintiff and separate appeals by garnishee and intervenor.

Error to the Municipal Court of Chicago;
Superior Court of Cook county;
Appeal from the Circuit Court of county;
County Court of county:
the Hon. , Judge, presiding. Heard
in the Branch Appellate Court
this court at the term,

Affirmed
Reversed
Reversed and remanded with directions.

Opinion filed Rehearing denied

for appellants.

for plaintiffs in error.

for appellees.

for defendants in error.

PRESIDING JUSTICE delivered the opinion of the court.

344 - 25604

FRANK C. WRIGHT,

Appellant,

v.

SAMUEL INSULL, Receiver, etc., CHICAGO CITY RAILWAYS, et al.,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

222 I.A. 638

MR. JUSTICE TAYLOR delivered the opinion of the court.

On October 26, 1918, Frank C. Wright, the plaintiff, brought suit for damages, for personal injuries, against the defendants, Samuel Insull as Receiver of the Chicago and Oak Park Elevated Railroad Company, the Chicago City Railway Company, and the Chicago Railways Company. At the close of the plaintiff's evidence and upon motion of counsel for the defendants, the trial judge instructed the jury to find the defendants not guilty. The jury found the defendants not guilty and, from a judgment thereon, this appeal was taken.

The evidence for the plaintiff shows substantially the following:- The plaintiff, a man about 60 years of age, who had resided at 228 North Mason avenue, Austin, for twelve years, and whose last business was farming and stock raising, on June 23, 1917, went with his niece, Geraldine Austin to the Crane High School. About 10 A.M. they left there to go to the Austin High School at the corner of Johns avenue and Fulton street, which is one block south of the intersection of Lotus avenue and Fulton streets. They took a Western avenue car to Lake street, then transferred at Lake to go

west on Lake street, taking a westbound surface car on Lake street. Their purpose was to get off at Lake street and Lotus avenue.

At Lotus avenue and Lake street the tracks of the surface lines (the Chicago City Railway Company and the Chicago Railways Company) run east and west, and just north, paralleling the tracks of the surface lines, but upon a slightly more elevated plane run east and west, the tracks of the Chicago and Oak Park Elevated Railroad Company, (of which the defendant Samuel Insull was Receiver.) The distance between the south track of the eastbound elevated line and the north track of the westbound surface line was six feet six or seven inches. The distance between the outer edge of the rail of the elevated line and the outer edge of the overhang of an elevated south of the rail was twenty three inches. The elevation of the road bed of the elevated line, above that of the surface lines, was twenty three inches, that is from the top of the rail of the surface line to the top of the rail of the elevated lines. The distance between an elevated and a surface line car when passing at the intersection was a shade over three feet. The top rail of the surface line is level with the pavement of the street. At Lotus and Lake the power of the elevated is obtained by trolley. The surface between the tracks of the surface and elevated lines was of gravel, making a rough incline from the tracks of the surface lines to those of the elevated. Just north of the tracks of the elevated road and parallel with them, rise the wall of the Chicago and Northwestern Railroad embankment.

When the westbound street car on Lake street, in which the plaintiff and his niece, a girl 16 years of age,

were sitting, neared Lotus avenue, being about at Laurel avenue, a block east of Lotus avenue, at nearly eleven o'clock in the evening, Geraldine Austin, plaintiff's niece, pressed the button, in order that she and her uncle might be able to get off at Lotus avenue. They then both arose and started forward from about the middle of the car, to the front platform, the plaintiff being in front. When they got to the front platform the motorman stopped the car and opened the north door. At that time there were four or five passengers on the front platform of the car who obstructed any view through the car windows. The plaintiff had never gotten off at that place before, and did not know how close the two sets of tracks were together. The motorman did not say anything when he opened the north door. When he opened the door, the plaintiff stepped out, and was immediately struck on his left side by a train on the elevated line which was going east. It is the testimony of the plaintiff that he did not hear any whistle of the elevated train nor any sound whatever; that he had no recollection of looking west; that he did not know that he was stepping on to a railroad embankment, although he knew the railroad was there; that he stepped on the slanting gravel or on the ties of the railroad; that he did not look west to see if a train was coming; that he was thinking of alighting; that as he stepped off he was struck immediately; that he does not remember whether at the time he was struck, he had both feet on the ground.

It is the evidence of his niece that when the motorman opened the door, the first thing she noticed was that the elevated train, that was going at a pretty good speed, was right there at the door; that the motorman called, "Look out", but that by that time her uncle was out of the

car; that she then called "Look out", and turned away her head knowing the train was so close it would strike him; that when her uncle stepped off, he stepped from the floor of the car right on to the elevated track, and just as he stepped the train hit him. It is the evidence of the witness Jurgens, a passenger on the street car, that she heard the motorman call, "Look out", that she then looked up and saw something fall and heard a thud as the body of the plaintiff struck the side of the car.

We are of the opinion that the evidence should have been submitted to the jury. Considering all the circumstances of the case, we do not feel justified in concluding that the conduct of the plaintiff, was, as a matter of law, of such a character that it can be said legally to have contributed to the injury. As to the negligence of the surface lines, we think there was ample evidence to justify its submission to the jury. Libby, McNeill & Libby v. Cook, 222 Ill. 206. The place where the car stopped was a dangerous one. The motorman knew the place for alighting was rough, at an angle, and that an elevated train might be going by, also, he was in such a position that he must be exercising care as he was bound to know that the train in question was dangerously near. Under such circumstances, to stop the car, open the door, and so without even a warning, to invite the plaintiff to get off, was almost wilful carelessness.

The situation in the instant case is very different from that in Thomson v. Gardner, etc. St. Ry. Co., 193 Mass. 133. In that case the plaintiff stepped off the car into a gutter or ditch which was between the tracks and the sidewalk, and the court held that, as a street is in no

sense a passenger station for the safety of which a street railway company is responsible, and as gutters like the one in question are not uncommon features of streets in our country towns, and as the conductor may well have assumed that she was familiar with the existence of gutters and would govern herself accordingly, that his failure to warn her was not negligence. Citing Bigelow and West End Street Railway, 101 Mass. 393. In the instant case not only was the footing dangerous, but there was the greater danger of oncoming trains.

In the Thompson case (supra) the court excludes from consideration such a case as this, saying, "It is unnecessary to consider what would have been the duty of the conductor had there been some unusual cavity into which she was likely to fall." Here, there was unusual danger. Apt cases illustrating the liability of the carrier are the following: Fort Wayne Traction Co. v. Gerrilius, 31 Ind. 464; Smart v. Louisville Ry. Co., 113 Ky. 15; Chesapeake and Ohio Ry. Co. v. Smith, 103 Va. 336; T. H. & R. Co. v. Bush, 96 Ind. 346; Otto v. Chicago Burlington & Quincy R. Co., 87 Neb. 503.

In conclusion, as there was evidence of negligence on the part of the surface lines, and evidence of care on the part of the plaintiff, taking into consideration the stopping of the car, the invitation to alight, the condition of the ground and the knowledge the motorman must be assumed to have had, and the plaintiff's rightful reliance on the conduct of the motorman, all of which should have been submitted to the jury, the judgment in favor of the Chicago City Railway Company and the Chicago Railways Company is reversed. As to the judgment in favor of the receiver; we are of the

opinion that the evidence fails to show any actionable negligence on the part of his company. As far as the receiver's railroad is concerned, the plaintiff was a trespasser and there is no evidence that the injury the plaintiff suffered could have been reasonably avoided. As to the Chicago City Railway Company and the Chicago Railways Company, the judgment is reversed and the cause remanded for a new trial. As to Samuel Insull, as receiver of the Chicago & Oak Park Elevated Railroad Company, the judgment is affirmed.

REVERSED IN PART AND AFFIRMED IN PART.

O'CONNOR, P. J. CONCURS.
THOMSON, J. DISSENTING:

Assuming that the defendant operating the street railway car was guilty, even of gross negligence, in my opinion the action of the trial court in directing a verdict was nevertheless right, because the evidence of the plaintiff himself demonstrates he was guilty of negligence which contributed to his unfortunate injury. The plaintiff had lived in the neighborhood involved, for twelve years. Although he had never had occasion to alight from a westbound surface car at this point before, he had ridden past there in the surface cars and also as a passenger on trains of the Elevated Railroad, "(quite often)" and he knew that the Elevated Railroad tracks at that point ran only slightly above the level of Lake Street. Although the distance between the nearest rails of the south track of the Elevated Railroad and the north track of the Surface Railroad was only six feet seven inches and the distance between passing cars, three feet, and although the tracks

and slightly elevated embankment of the Elevated Railroad were immediately before him, as the door of the surface car at the front platform was opened, the plaintiff testified that, upon that door being opened, he did not look to see if an Elevated train was approaching, but stepped off the car without looking in any direction except immediately in front of him and that he did not step down onto the car step and thus to the ground immediately below the step and close to the car he was leaving but that he stepped directly out from the car platform, over the step and onto the Elevated Railroad embankment, a distance of some three feet, and was instantly struck by the passing elevated train. Counsel forthe plaintiff refer to a number of decisions in support of the contention that under these circumstances, the plaintiff was not guilty of contributory negligence. In my opinion there is a clear distinction between the facts involved in the cases cited and those presented here.

391 - 25652

GORDON A. RAMSAY, Admr. of the Estate of Patrick Kinnane, Deceased, Appellee, v. CHICAGO CITY RAILWAY CO., et al, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

222 I.A. 638

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff brought suit for damages against the defendants, claiming that one Patrick Kinnane was on February 19, 1918, through thenegligent operation of a street car, struck, and so injured that he shortly thereafter died. The cause was tried before a jury. There was a verdict and judgment in the sum of $3,000.00, and this appeal is therefrom.

It is the theory of the plaintiff, as alleged in the three counts of the declaration, that on the morning of February 19, 1918, between 5 and 6 o'clock, near the southeast corner of 33rd street and South Ashland avenue, that, as the deceased (Patrick Kinnane) was attempting to board a northbound street car belonging to the defendants, or as he was attempting to board the street car and before he had gotten on and reached a place of safety, on the platform, or as he was attempting to get on the car while it was moving slowly, of which the motorman had knowledge or with care, should have known, the defendants' motorman so carelessly and negligently managed and operated the car, or so carelessly, negligently and improperly set the

car in motion, or so carelessly, negligently and improperly suddenly accelerated the speed of the car, that the deceased was thrown from his position to, and upon the street and so injured that he shortly thereafter died.

As there was no proof that the deceased attempted to board the car while it was in motion, there remains but the claim that the defendants were guilty of negligence in not exercising sufficient care in allowing thedeceased after the car stopped, reasonable opportunity to get on. The theory of the defendants is that the injury was not caused as charged in either ofthe three counts of the declaration, but that the deceased was struck by the shoulder or side of the car while he was standing on the street. The question then is whether the evidence sustains the passenger and carrier case set up in the declaration, or whether it shows that a collision took place between the deceased and the car while he was standing on the street and before he made any attempt to board thecar.

Patrick Kinnane, the deceased lived near 33rd street and Ashland avenue, Chicago. He was a blacksmith; his place of employment was at Randolph street and Michigan avenue. His widow said he was 55 years old, although she stated he was 38 or 39 years old when they were married, and that their eldest child was 37 years old at the time of the trial. His earnings were $2.65 a day. On February 19,1918, between 5 and 6 in the morning, he left his home and went to the southeast corner of 33rd street and Ashland avenue, where he waited for a car to take him down town. Various cars passed that point, going north, some went straight through to Clybourn avenue, some to Clark and 22nd street, and some down town to Randolph street and Wabash avenue, within

a block of where he was employed.

It was a dark, foggy, misty morning. There was a light in a saloon on one croner. The headlight, and the lights inside of the car in question were lighted. The deceased stood on the southeast corner of the intersection, where people usually wait for the northbound cars, but, close to the rails. Two doctors testified that his eyesight was defective. A northbound car, approached the intersection from the south. It was a number 9 through route car which ran straight north on Ashland avenue to Clybourn avenue and did not go down town or anywhere near where he was employed. The motorman, according to his testimony, thinking that he wished to board the car, brought the car to a stop at the usual stopping place. One witness, Finnegan, testified that the deceased attempted to board the car at the rear platform and while doing so the car started and seemed to take his feet from under him; that he dropped to the ground and seemed to strike his head; that he was dragged 25 feet. The other eyewitnesses, being two passengers, themotorman and conductor and a doctor, all testified to the effect that the deceased was struck by some part of the car before the platform reached him; that he did not attempt to board thecar. The only visible injuries he suffered were on his face and forehead.

After the injury he was picked up and taken care of, and almost immediately taken to the People's Hospital. At the hospital he was examined. He was unconscious, and showed cuts and bruises on the forehead, nose and chin. There were no other injuries found. He died on February 23, 1918, without having regained consciousness. He left a widow, three married daughters, aged respectively, 37, 33 and 30

years; a married son, aged 35 years, and an unmarried daughter aged 25 years.

The cause was tried before the jury and resulted in a verdict for the plaintiff in the sum of $3500.00. Judgment was entered upon that verdict.

Six occurrence witnesses testified. One for the plaintiff and five for the defendant. The plaintiff's case rests on the testimony of one Frank Finnegan.

The substance of his testimony is as follows: He was working for the city and had been, for 7 or 8 years, a water pipe extension custodian. On the morning in question he was walking north on the east side of Ashland avenue about 100 feet south of 33rd street. He saw two men standing about 50 feet south of the corner, when a street car arrived from the south and stopped. Both of the men were near the back platform when it stopped. After it stopped one man got on, and the otherhad just reached for the car, and had one foot on, when thecar started with a jerk and threw him. He did not know either of the men. The man that fell was the larger of the two, and looked older. At the time the car started up, he reached for the last handle of the platform and got one foot on the step. While his left foot was on the step and he had hold of the rear handle, the car started up. It seemed to take his foot from under him. It dragged him probably 25 feet. Finnegan hollered at the conductor when the man fell and while the car was going. The car went about a car length from where he saw him getting on, beforehe fell in the street. When thecar came to a stop, he was lying in the street at the rear end of the car. At the time he saw the man step upon the step, the car was standing, then after that he saw the car start forward. On

cross-examination, he said that he was about 100 feet from the corner when it occurred; that when the car started up he was about 25 feet south of the rear end; that it was a pay-as-you-enter car; that as soon as the car started, it seemed to take his feet from under him and he dropped to the ground and seemed to strike on his head; that he only had hold of the rear handle, and had his left foot on the step and his right foot was near the ground; that he fell at the time it started forward; that the car went forward probably a car length; that he seemed to be dragged in some way; that it looked as though his foot or his trousers or something was caught on the step of the car; that he was dragged about 25 feet; that when he was picked up, he was about at the rear of the car. On re-direct he says the man fell from the car just about the time it stopped.

The occurrence witnesses forthe defendant were Weaver, a night watchman, Arff, a foreman for the Omaha Packing Company; Jeffers, the motorman; Dr. Kem, a physician and surgeon; and Herold, the conductor.

Weaver testified that on the morning in question he was riding on the front platform; that as the car got close to 33rd street, he saw a man standing about six or eight inches from the side of the vestibule as the car was passing; that the car was not running fast; that it seemed to be slowing down to take him on; that he saw him through the front part of the vestibule; that he heard a knock or bump that appeared to come from a point almost even with him; that the car ran a little ways and then stopped.

On cross-examination he testified that there were about eight persons on the front platform; that he was stand-

text

ing with his back to the radiator; that there were two passengers standing at his right; that as the car came to 33rd street, he saw one man standing on the street, just as the car passed him; that he was standing where a person ordinarily stands to get on the car; that the car stopped at the regular stopping place, and then started up and ran a short distance after he heard the bump; that the bump might have been a bump by a person striking on the step of the car, or any kind of a noise; that the man he saw was standing "pretty close", but the fore end passed by him without coming in contact with him.

Arff testified that he was riding on the front platform on the right-hand side; that it was a foggy and misty morning, raining and drizzling; that you could see about 15 or 20 feet; that as the car got within 15 feet of 33rd street, he saw two men about 5 feet from the crosswalk and about 18 inches from the rail, the shorter one closest to the rail; that he moved the least little bit as the car approached; that the front vestibule went by him; that at that time the car was going about 15 miles an hour and was slowing down to stop; that he then heard a knock; that it seemed to be in back of him, about three or four feet; that the man seemed to be about even with that part that sticks out at the vestibule when he heard the knock; that the car went ahead, and someone shouted, "Don't you know you hit somebody"; that the motorman got a bell to stop, and stopped; that he, himself, got off and saw a man lying in the street at the rear of the rear vestibule; that after he heard the bump, in his judgment, the car went about ten feet; that after the car finally stopped, the front end was about half way over the crossing.

On cross-examination he testified that it was not

freezing; that it was soft and slushy; that the headlight and the lights in the car were lighted; that even then you could only see ahead five to eight feet; that he thinks it was the older of the two men who got hurt; that the car stopped before he heard the bump; that when it stopped, before the accident occurred, the front end was south of 33rd street; that afterwards when the man was found in the street, the front end was eight or ten feet north of the crossing or near the center of the intersection and the man was lying at the rear step; that the front part of the vestibule passed by both of the men and then a moment later, he heard a bump, and the car stopped; that when he heard the bump the car was moving. Jeffers testified that you could only see ahead about fifteen or twenty feet; that the street lights were out; that as he came down to 33rd street he was going about four or five miles an hour; that he saw two men standing about two feet, maybe more, from the track, about the place people would stand to wait for the car, about eight or ten feet south of the crosswalk; that as the car came up, one of the men, the smaller, leaned forward, and seemed to look south; that he was then about two and a half feet back from the rail, with his head nearest to the car; that as he saw the two men, he began stopping for them; that he sounded the gong; that as he was stopping he heard a bump; that after he heard it he brought his car to a standstill; that the conductor gave him a bell to go ahead; that he did not know then if he had struck anyone as the front vestibule had cleared them; that when the conductor gave him two bells, he started up; that he then got the emergency bell to stop, and stopped, right away with the front end about 10 or 15 feet north of the crosswalk; that he got off and saw the deceased lying just north of the back platform. On cross-examination he testified that the two men were

not standing quite far enough back; that he stopped his car, as nearly as he could judge, about opposite where they were standing; that the deceased, when he saw him, was lying south of the rear step, almost opposite the end of the car; that when his car passed the two men, the old man leaned forward; that he heard someone shout; that that was after he heard the bump; that the bump sounded as though some object struck some portion of the car; that he was stopping at the time; that it occurred before he stopped the first time to take on passengers; that the car stopped with the front end in the intersection; that he stopped the second time because he got the emergency bell. On re-direct examination he testified that when he heard the bump, he was stopping the car; that he then came to a stop; that he then got two bells to go ahead. When asked, "Then after you got the two bells, that is when you did it, is that right?" he answered, "Yes sir."

Dr. Kern testified that he knew the deceased; that on the morning in question, he was standing in the front doorway of 3302 South Ashland avenue, where he lived, which was just across the street, west from the place of the accident; that when he first saw Kinnane (the deceased) he was standing in the track or close to the track waiting for a car; that as the car approached Kinnane was motioning with both hands for the car to stop; that he was sort of stooped over; that as the car came down alongside of him or toward him, he was either standing right on the rail or very close to it; that he was standing right in the track as the car came up and he (the Doctor) knew he could not get out of the way of the car; that the car came almost to a stop at the time it reached the place where Kinnane was standing; that he then saw, under the car, the body of Kinnane lying down, and he knew he had been

struck; that at that time he was not under the car, he was on theother side; that he sae him fall to the ground; that he noticed the car move again, and then come to a stop; that where the car made its first stop, Kinnane was lying at about the center ofthe car; that he could see him past the wheels; that he thinks Kinnane was first underneath the car; that Kinnane's eyesight was poor; that he had seen him make change a good many times and he would have to put the money close to his eyes.

On cross-examination he testified that if there were two men he did not notice them; that he saw only a man and a woman; that Kinnane was standing just about on the rail until the car came up; that he made no effort to get out of the way at all; that his (the Doctor's) view under the car was not obstructed as soon as the front end of the car passed; that he saw under the car; that he knew Kinnane was in a position of danger; that he was a near-sighted man; that he wentover and found him lying near the back end of the car; his feet toward the car; his head at an angle, south from the car; that he heard some one shout or make an outcry; that the car stopped, then started again, then stopped again; that he heard the outcry after the car started the first time from its regular stopping place; Herold, the conductor, testified that the car stopped at 33rd street to pick up a couple of passengers; that when it stopped no one got on; that there was one man standing right opposite the step and, as he made no effort to get on, he gave two bells to go ahead; that as it started some one standing on the side, said "Do you know you hit a fellow"; that he then gave the emergency bell and jumped off; that he found the deceased lying down on his back in the mud, his head toward the curb-

stone; that he had not attempted to board the back platform.

On cross-examination, he testified that at the time of the accident he only saw one man on the street; that he did not see the deceased until he saw him lying on the street along side the car; that he did not hear any bump; that he saw a man going towards Archer avenue; that he called to him to help, but he didnot, and then he got themotorman; that he (the conductor) was alone on the back platform; that there was about 25 passengers in the body of the car; that the deceased was lying even with the rear dashboard, his feet towards the rails.

The evidence showed that thefront vestibule of the car is narrower then the body of the car; that there is what is sometimes called a shoulder or the corner of the body of the car, which is about eight inches wide. The overhang of the car was twenty-two and three quarters inches.

Dr. Gary, who examined the deceased at the hospital after the injury, testified that Kinnane had a cataract of the left eye; that the deceased had no other bruises or abrasions, save on the face and head.

The testimony of Finnegan, if fully believed, makes out a prima facie case of negligence. That of Weaver, Arff, Jeffers, Herold and Dr. Korn, if fully believed, proves that the defendants were not guilty of any negligence as charged in the declaration. Is the verdict against the manifest weight of the evidence? We are constrained to conclude that it is. If the testimony of Finnegan is to be believed, then Weaver, Arff, Jeffers, Herold and Dr. Korn were all mistaken is practically inconceivable, and that they all committed

perjury is a conclusion that would be almost monstrous.

Finnegan says Kinnane reached for the last handle, trying to get on. The conductor says no one attempted to get on. Dr. Korn says Kinnane was standing on the rail or very near it and that he knew Kinnane could not get out of the way, and that he saw his body, under the car, lying down.

Weaver says he saw a man standing about six or eight inches from the side of the vestibule as the car was passing, and then heard a knock or bump. Arff says practically the same thing. All admit it was a dark morning; that the street lights were out. Then, too, the evidence shows that Kinnane had a cataract of the left eye, and was near-sighted. Further, the car in question was a through route car, going north to Clybourn avenue, and which would not take Kinnane downtown to his place of employment, or anywhere near it. There seems to be no reason why he should have wished to get on that particular car. As a matter of fact, considering the inclemency of the weather, the darkness, the impaired eyesight of Kinnane, the fact that it was not a car that would take him to his work, the fact that he was standing close to, if not on the tracks, it seems a reasonable conjecture, that he was anxious to discover if the car was one for him to board to take him to his work, and that in his anxiety he got too near and in consequence was struck and killed.

We are of the opinion that the manifest weight of the evidence shows that the collision, and consequent injuries and death, was not brought about by any negligence on the part of the defendants, but that it was due to the want of care on

the part of the deceased. Segal v. Chicago City Ry. Co., Gen. 24735.

The judgment will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the evidence does not show any negligence on the part of the defendants.

THOMSON, J. CONCURS.

O'CONNOR, P.J. DISSENTS.

400 - 25661

A. ALCHANSKAS & SON,

Appellee,

v.

NORMAN DAIRY COMPANY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

222 I.A. 638

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment entered upon a directed verdict for $611.29 in favor of the plaintiff and against the defendant.

The plaintiff having delivered certain hay and alfalfa to the defendant, brought suit for $611.29. The defendant, admitting that the hay and alfalfa claimed by the plaintiff to have been delivered had been received and not paid for, filed a plea of set-off, claiming that on or about October 1, 1917, it made an oral contract with the plaintiff to purchase 150 tons of first class timothy hay, at $18.00 per ton, to be delivered within one year as the defendant might request; that the plaintiff delivered 45 tons, but although requested to deliver the balance, failed and refused to do so; that the defendant thereafter went into the market and bought 105 tons of hay at $29.00 per ton, the lowest price obtainable; that by reason thereof it has sustained damages to the extent of $1155.00, being the difference between 105 tons at $18.00 per ton and at $29.00 per ton. In answer to the plea of set off, the plaintiff denied that it ever entered into an agreement

to sell 150 tons of hay at $18.00 per ton.

At the trial, which was before a jury, the defendant admitted that the plaintiff delivered and it received hay and alfalfa in November and December 1917, as set up in the plaintiff's statement of claim, and that they have not been paid for, and that the prices were as therein set forth, that is $18.00 per ton, and $42.00 for one ton of alfalfa.

The chief question in the case arises upon the plea of set-off. It is the theory of the plaintiff that it made no contract to sell the defendant 150 tons of timothy hay at $18.00 per ton; and it is the theory of the defendant that it did, and that the plaintiff only delivered 45 tons of that amount and is liable in damages, by way of set-off, for the breach.

At the close of all the evidence the trial judge directed the jury to bring in a verdict for the plaintiff in the sum of $611.29. That was done, and judgment entered accordingly.

We are of the opinion that there was ample evidence of the claim of the defendant to justify its submission for the determination of the jury.

The plaintiff was engaged in the ebusiness of selling hay. One Liederling, a salesman for the plaintiff, in October, 1917, according to the testimony of one Quinn, assistant manager of the defendant, called at the defendant's office and gave him an order for 150 tons of first class timothy hay, and at that time told Quinn that the plaintiff had on hand in Chicago, 80 tons, and 15 cars it had bought in the country,

and which owing to a shortage of cars, at the time, it could not get in right away. The testimony of Quinn, as to his conversation with Kiederling is not denied. Kiederling was not called as a witness. Quinn further testified that the price was $18.00 per ton, and that the 50 tons were to be delivered at once, and the remainder just to keep the hay mow filled up.

It is admitted that 45 tons of timothy hay were delivered. Quinn testified, also, that there were 20 tons of prairie and one ton of mixed, which were delivered. He further testified that he called up the office of A. Eichenbaum, of the plaintiff company, about November 14, 1917, in regard to the delivery of the 150 tons; that Eichenbaum said that the reason he put in prairie hay was just to hold, just to fill up until he got timothy hay in Chicago; that on account of the shortage of cars, he did not have it then; that he called up Eichenbaum, the father, on December 6, 1917; that he said he could not get the hay at the time and would not put it in; that Kiederling was only selling on commission and he would fill our contract if he could buy the hay at that price; that he could not buy it at that price now; that on November 14, 1917, Eichenbaum said he would fill the contract.

Part of the 25 tons that was delivered was paid for; and most of the inferior hay that was delivered was kept and used; although, part of one load was returned. As to the time within which the 150 tons of hay were to be delivered, Quinn testified that the agreement was that 50 tons were to be put in right away, and then the plaintiff was to keep the defendant supplied until the contract expired.

As to payments: Quinn testified that payments

were made between the 7th and the 10th of the month from the head office; that settlements were made monthly; that that arrangement had been in force with the plaintiff for some time. No witnesses were called by the plaintiff.

As we have already said, we are of the opinion that the trial judge erred in not submitting the evidence as to the contract and the set-off to the determination of the jury. The plaintiff contends that the price of the hay and alfalfa sued for was not the outgrowth of a contract for the purchase and sale of 150 tons of timothy hay, and, therefore, that the set-off arises out of a separate transaction. There are two reasons why that contention is not tenable. In the first place the appropriateness, as a matter of pleading, of the plea of set-off was not raised in the trial court, and, therefore, it cannot now, for the first time, be raised. (Dourance v. Dearborn Power Co., 188 Ill. App. 86) and in the second place, it is quite obvious, from the evidence of the defendant, that the claim for damages for a breach of the oral contract, arose out of the very transaction that resulted in the delivery by the plaintiff of the 45 tons of hay.

It is further contended that there was no evidence that the plaintiff was in default under the alleged oral contract. Even if we assume that the plaintiff agreed to deliver 80 tons at once and the remainder as the defendant needed it to keep the hay mow filled up, it is the testimony of Quinn that Eichenbaum about December 6, 1917, told him he would not fill the contract; that he could not get the hay at the time and would not put it in; that he could nethbuy it at that price now.

That was sufficient to justify the defendant in considering the contract as at an end, and the pl

considering the contract as at an end, and the plaintiff in default.

It is further contended that the proof as to the time for delivery varied from that alleged in the plea of set-off. The time in the plea of set-off is stated to be within one year as the defendant might request. That is entirely consistent, as far as the requisites of pleading are concerned, with the proof. The variation, if any, is immaterial.

The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

34 - 25791

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

PAUL J. BUSH,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

222 I.A. 638

MR. JUSTICE TAYLOR delivered the opinion of the court.

On July 18, 1919, three men, McGurn, Goddin and Prendergast, police officers, went into theplace of business of the defendant at 75 West Randolph street, Chicago, a place which had been conducted as a saloon for over 30 years. Officer Prendergast went in behind the bar and took from behind theback board, back of the bar, from among certain glasses and bottles, a bottle containing some liquid which McGurn, at the trial, testified smelled like whiskey. They had no search warrant or warrant of any kind.

On the next day, July 19, 1919, an information against the defendant was filed in the Municipal Court The information recited:

> "It appearing to the Court that the defendant herein was arrested without warrant, capias or other writ and is now here present in open Court, the Court takes jurisdiction of the person of said defendant and the Bailiff of this Court is ordered forthwith to take the body of said defendant into his custody and said body safely keep so that said Bailiff may have the same before this Court to answer to the Plaintiff for and concerning the offense charged in said information, and this order shall be the sufficient warrant of said Bailiff for so doing."
>
> "It is further ordered by the court that this

cause be and the same is hereby transferred to Criminal Court, Branch Number 18, for jury trial."

On October 23, 1919, the defendant having signed a jury waiver the cause came to trial without a jury. Counsel for the defendant made a motion to quash the information. This was overruled. The defendant was then arraigned and pleaded not guilty. At the trial, only two witnesses were called; Cowern, a police officer for the results, and the defendant, Paul J. Buse, for himself.

Cowern testified that he, together with two other police officers, Geddin and Prendergast, on July 18, 1919, between 7 and 8:15 in the afternoon, went into the defendant's place of business at 75 West Randolph street; that at the time there were a number of men in the saloon; that Prendergast went behind the bar, and from behind the back board of the bar and came back with a bottle; that it was obtained from among glasses and other bottles; that Prendergast gave it to him, McCurn. When asked what was in it he said, "Whiskey. When asked how he knew it was whiskey, he said, "Well, I had an alcoholic smell". It was admitted that it was not analyzed, and there is no evidence that anyone tasted it. He further testified, on cross-examination, that he saw no drinks served out of that bottle; that he saw the defendant sell other drinks; that he saw two ginger ale highballs on the bar; that he did not get a smell of whiskey served when the men asked for high-balls.

Buse the defendant, testified that prior to July 1, 1919, he was running a saloon, selling intoxicating liquors; that he has sold none since that date; that on the day in question the three officers came in, rushed behind the bar, looked around, and seemed to pick up something;

that he did not know that the bottle in question was there; that he never saw the contents of the bottle before; that he did not have it for sale; that things might be put away under the counter that he knew nothing about; that he did not keep whiskey to be used, or given away, or for sale, and did not manufacture any. On cross-examination he testified that he sold no whiskey on July 18, 1919, and that there was no whiskey in the high-balls that were sold.

The abstract of record shows the following finding and judgment of the trial court:

> "The court finds the defendant, Paul J. Buse, guilty of the criminal offense of keeping for sale and disposing of, within prohibition territory, intoxicating liquors on said finding of guilty, and sentenced the defendant to the county jail of Cook County forthe term of sixty days and that he pay a fine of $200."

Upon that judgment the question arises, did the evidence show that the defendant kept for sale and for the purpose of disposal, intoxicating liquors? As to the disposal, there is no evidence whatever that whiskey or any other form of intoxicating liquor was sold or given away at the time in question. McGurn's testimony refers to what he calls high-balls, but it is quite obvious he knew nothing about their nature. When asked if he knew that there were several drinks that are non-intoxicating, called high-balls, he said he did. And, further, that he did not get a sample of what was served when the man asked for high-balls. The defendant testified that he did not, at the time in question, manufacture, keep for sale, or to be used or given away any whiskey; that not only did he not have the bottle for sale, but that he did not know it was there. As to the contents of the bottle in question, there is no claim that

there was any evidence that any of it was sold or disposed of in any way.

As to keeping intoxicating liquor for sale; the mere presence of the bottle, back of the bar, is not evidence beyond a reasonable doubt that it was there with the intention of the defendant to dispose of it, especially when the defendant under oath denies even knowledge of its presence.

In the face of a denial by a shop-keeper, or a saloon-keeper that a certain thing is there for sale, the mere presence of an article in the particular place of business is not necessarily sufficient evidence to prove beyond a reasonable doubt that it is kept for sale. Men are presumed to obey the law, and if the thing can be kept for sale without violating the law, the burden is on the State to make affirmative proof that it is kept for sale. The negative condition, the mere presence of the obnoxious thing, coupled with the denial of the proprietor, is rather proof of the contrary, and certainly falls far short of sufficient proof to justify depriving a man of his liberty.

We are of the opinion that the judgment is erroneous and must be reversed.

REVERSED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

44 - 25808

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

ESTHER RICHMAN,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 339

MR. JUSTICE TAYLOR delivered the opinion of the court.

Practically the same questions are herein involved, that were considered and determined in the case of People v. Sam Richman, Gen. No. 25807. Our opinion in that case determines this.

The judgment will be reversed.

REVERSED.

O'CONNOR, P.J. and TRUMBULL, J., concur.

No. [illegible]

VENITA JONES,

Defendant in Error,

v.

HAROLD A. JONES,

Plaintiff in Error.

ERROR TO
SUPERIOR COURT
COOK COUNTY.

222 I.A. 639

MR. JUSTICE TAYLOR DELIVERED THE OPINION OF THE COURT.

On September 25,1918, the complainant brought suit for divorce against her husband, Harold A. Jones, the defendant. The charge was adultery. On November 25,1918, the defendant filed an answer denying the charge, and on February 7,1919, filed a cross-bill of complaint charging his wife with being addicted to the use of intoxicants and with extreme and repeated cruelty. On February 18,1919, she answered the cross bill of the complainant, denying the charges of drunkenness and cruelty. On March 24,1919, the complainant filed a replication to the defendant's answer to the original bill of complaint. There was a trial by jury which lasted eight days, and on April 30,1919, a verdict was rendered finding the defendant, Harold A. Jones, guilty of adultery, that the complainant, Venita Jones, was not guilty of extreme and repeated cruelty, and the defendant, Harold A. Jones, was not guilty of habitual drunkenness. A motion for a new trial was made by counsel for the defendant and was overruled.

A decree was entered on June 4,1919, and on June 9,1919, an amended decree. The latter amended decree granted the complainant, Venita Gould, a decree of divorce on the ground of the adultery of the defendant, Harold A. Jones, and gave the custody of Hubert L. Jones, their only child, to the

complainant, the mother. The decree also provided for certain alimony and solicitor's fees and the maintenance of the child and ordered the dismissal of the cross-bill of the defendant, Harold A. Jones.

An appeal from that decree having been taken and perfected, the matter is now here for determination.

Many errors were assigned on behalf of the defendant but the only one discussed in the briefs filed is the charge that the evidence failed sufficiently to prove that he was guilty of adultery. We shall, therefore, consider the other errors as waived. Jones v. Jones, 186 Ill. 109; Miller v. Lowell, 223 Ill. 291.

It is an ancient truism of the law that, as adultery can seldom be demonstrated by ocular proof, it may be established in divorce proceedings by circumstantial evidence. Zimmerman v. Zimmerman, 242 Ill. 554; Herman v. Herman, 210 Ill. 514; Stiles v. Stiles, 107 Ill. 576. The question, then, that arises here, is whether the circumstantial evidence that was introduced was sufficient. We think it was. The evidence was voluminous, much of it being irrelevant and immaterial. But, it was presented to the jury, they saw and heard all the witnesses and considered therefrom that the defendant was guilty; and that verdict, under our procedure, is entitled to respect. In Garrett v. Garret, 252 Ill.518, the court said:

"Under the statute either party has a right to have the divorce heard by jury, and the jury trial has all the incidents of a trial at common law, the verdict having the same force and effect, not being merely advisory, as in an ordinary chancery suit. (Lenning v. Lenning, 176 Ill.180; Berg v. Berg, 243 Id.209.) The presumption is in favor of the verdict until it is successfully impeached in some mode provided by law. (Becker v. Becker, 79 Ill. 352. In this case the judge and jury saw the witnesses, heard them testify, and had vastly superior advantages for ascertaining the truth and detecting falsehood over any court sitting as a court of review."

The complainant and defendant were married on May 8,1910.

At that time he was about 22 years old and had known the complainant for about five years. They had but one child, a son, who at the time of the trial was six years old. The husband was a grocery salesman for about six years, immediately prior to the time of the trial, and prior to that had worked at advertising and statistical work. At the time he was married he was auditor and assistant manager of a restaurant company. The complainant was an actress, and subsequent to her marriage continued for some time in that work. Six or seven months after the marriage she went to New York City with her mother, and, some months later he joined her there. Later she joined the "Orpheum Circuit". Afterwards, they both came back to Chicago and she continued for a time traveling the circuit, until compelled to stop owing to the birth of her child. Latterly, they lived at 2[illegible] [illegible] Marquette Road, Chicago.

As to the circumstantial evidence of adultery:- The testimony that was introduced as to the association of the defendant and one Florence Nelson is amply sufficient, if believed, to justify the verdict of the jury. Florence Nelson admits telephoning him and riding around in his automobile alone with him on a number of occasions, and that on September 22,1918, she went with him to his home when no one else was there. The complainant testified that she went home, took some officers with her, that they found her husband and Florence Nelson there; that she accused them both; that subsequently, he told her he had done wrong; that he was sorry, and that it would never happen again. Then the testimony as to Helen Bell is strongly persuasive that the defendant committed adultery with her. There is also other evidence tending strongly to show that he had a venereal

disease which he communicated to his wife; and a volume of evidence, if believed, going to show that at times he drank to excess, and was of a licentious and lascivious nature. And, further, there is the evidence of Clarence Reum that, by itself, practically proves that in the night of May 5,1912, he committed adultery. Reum says that he and the defendant "picked up" a couple of girls at 63rd and Langley,in the defendant's machine, drove around certain parks and then went to the defendant's flat; that there they had some drinks, intoxicating drinks; that he left with one of the girls about one o'clock; that the following day the defendant told him that he took the other girl out at seven o'clock in the morning. Although, there is a conflict in the evidence and positive denials by the defendant and other witnesses, we are of the opinion that the verdict of the jury must stand. In Carter v. Carter, 164 Ill.404, the court said, " It is also insisted in the argument that the verdict of the jury on the cross-bill was manifestly against the evidence. Much evidence was introduced by the respective parties upon this branch of the case. The evidence was conflicting, and it was the peculiar province of the jury to weigh the evidence, to reconcile it, so far as that could be done, and, after a full consideration of all the evidence, determine with which one of the parties the evidence preponderated. This has been done, and this court has held in many cases where the evidence is conflicting, the verdict of the jury must be final. It would serve no needful purpose, therefore, to enter upon a critical analysis of the evidence. The jury have found upon it, and under our uniform practice their verdict must be regarded as final where the issue has been fairly submitted by the rulings of the court."

A critical examination of all the evidence constrains us to believe that it is only right that the verdict of the jury should stand. The decree will therefore be affirmed.

AFFIRMED.

O'Connor, P.J. and Thomson,J. concur.

89 - 25880

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

ALFANS MASUILIS,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 639

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an information that one Alfans Masuilis, the plaintiff in error, on September 5, 1919, wilfully and maliciously sold an automobile, subject to a chattel mortgage, to one Lancanskis, "without having first obtained the written consent of one Daniel Petrulis to sell and convey said automobile." The information recites, further, that the chattel mortgage was given to Daniel Petrulis by Masuilis (defendant in error) and Tony Willis to secure the principal sum of $375.00, and that Masuilis and Willis by said mortgage bargained and sold and conveyed to Petrulis the automobile, and that the automobile was continuously after March 19, 1919 and on September 5, 1919, subject to the lien and title created by said chattel mortgage given by Masuilis and Willis to Petrulis, in violation of section 7, chapter 95, Revised Statutes. A capias was issued and the defendant arrested and tried before the court without a jury and found guilty of the criminal offense of selling mortgage property in violation of Sec. 7, Chap. 95, of the Revised Statutes, and sentenced to pay a fine in the sum of $535.00 and costs.

The section of the statutes referred to is as follows:

"Sale without consent of mortgagee - Punishment. Sec. 7. Any person having so conveyed any personal property who shall during the existence of such title or lien, sell, transfer, conceal, take, drive or carry away, or in any manner dispose of such property or any part thereof, or cause or suffer the same to be done without the written consent of the holder of such incumbrance, shall be guilty of a misdemeanor, and on conviction may be fined in a sum not exceeding twice the value of the property so sold or disposed of, or confined in the county jail not exceeding one year, or both, at the discretion of the court."

It is contended that the information fails to state that a crime was committed; that it does not charge a disposal of mortgage property "without the written consent of the holder of the incumbrance." An examination of the information as it appears in the record shows that it charges the defendant, not only in elaborate but sufficiently apt language, with a violation of Sec. 7, Chap. 95 of the Revised Statutes. It recites that the automobile was sold by the defendant on September 5, 1919; that its value was $535.00; that that amount was received at the sale; that the sale was made "without having first obtained the written consent of one Petrulis"; that the automobile was "subject to the lien and title created by ... a certain chattel mortgage" to Petrulis given by the defendant and one Tony Willis to Petrulis to secure the principal sum of $375.00; that the chattel mortgage granted, bargained, sold and conveyed unto Petrulis, the automobile, and that the automobile was continually, after March 19, 1918, and on September 5, 1919, subject to the lien and title created by the chattel mortgage; and that all that was done in violation of Sec. 7, Chap. 95, of the Revised Statutes.

Even if a motion to quash would have been good, no such motion was made and so cannot now be of avail. Francis v. Weber, 152 Ill. App. 102.

It is contended that the information did not charge and the evidence did not show the disposal of mortgaged property without the written consent of the holder of the incumbrance. But, as the evidence in the record shows that Petrulis still owned the notes and mortgage - as that may be inferred from the testimony of the defendant himself - we are of the opinion that that contention is untenable.

It is further contended that the fine given was excessive, but, as the statute provides that the fine may be "in a sum not exceeding twice the value of the property so sold or disposed of", and the evidence shows that the value of the automobile was in the neighborhood of $678.00, that contention is untenable.

We desire to call the attention of counsel forthe defendant to the fact, that the abstract of record which was filed is altogether incomplete, especially as there is no certificate that it contains an abstract of all the evidence. People v. Adams, 289 Ill. 339.

Finding no error in the record the judgment is affirmed.

Affirmed.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

101 - 25872

E. C. STEARNS COMPANY, Plaintiff in Error, v. HARRY A. SMITH, Defendant in Error.	ERROR TO CIRCUIT COURT, COOK COUNTY.

222 I.A. 639

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff brought suit against the defendant upon a written contract for an alleged installment of 1041.66. The cause was tried without a jury and judgment entered in favor of the defendant. This appeal is therefrom. The evidence was practically all stipulated. On November 1, 1916, the plaintiff and defendant entered into a written contract, which is as follows:

> "This agreement made this 1st day of Nov. 1916, between E. C. Stearns & Company, party of the first part, and Harry A. Smith, party of the second part.
>
> Witnesseth: That party of the first part agrees to sell and deliver to party of the second part at their factory, Syracuse, New York, and second party agrees to purchase the property consisting of parts of typewriters made or in process of construction, together with such tools and special machinery for the manufacture of typewriters that the party of the first part has on hand and to be inventoried, which inventory is to be annexed to and become a part of this contract, for which party of the second part agrees to pay party of the first part the sum of $15,000 in the manner following: The sum of $2500 upon delivery of said property, and the balance remaining of $12,500 in royalties in the sum of $2.50 on each and every typewriting machine manufactured, whether from materials and supplies in said inventory mentioned or otherwise; said royalty payments to commence upon the first day of the month next succeeding the expiration of one year from the date of this contract, and quarterly thereafter in an amount

to aggregate not less than $1041.66, it being the intent and purpose of this agreement that said sum of $12,500 shall be paid in equal quarterly payments within a period of three years next succeeding the expiration of one year from the date of this contract.

The title to all of said property shall be and remain in theparty of the first part and shall not pass to the party of the second part until said entire sum of $15,000 or any judgment recovered therefor, or for any part of said amount shall have been paid in full.

It is hereby further agreed that upon the default of the party of the second part in making any of the payments at the times hereinbefore set forth, this contract shall thereupon become null and void and all obligations of either party hereto cease and determine, except the liability of this second party for earned and unpaid royalties, and the party of the second part will surrender to party of the first part, properly boxed or crated, f.o.b. cars Syracuse, New York, all tools, special machinery, patterns, Stearns typewriters and all parts of same he may have on hand at the time of default, it being the intention to return to party of the first part all the material conveyed to the party of the second part less what has been used at the time of default, the party of the first part to retain all moneys paid hereunder as liquidated damages and to collect such moneys as may then and at that time be due and unpaid for royalties on such machines as may have been manufactured.

And it is hereby further agreed that said party of the second part shall make and render to the party of the first part a monthly statement of machines manufactured promptly at the end of each month, commencing with the month in and during which said machines are first manufactured, and that no failure of production of machines or royalties during any stated quarter when said payment shall be due shall beconsidered an excuse for the non-payment of any quarterly payment due, anything in this agreement to the contrary notwithstanding."

The property which was sold under the contract by the plaintiff was delivered to the defendant, and on November 25, 1915, the defendant paid to the plaintiff $2500.00. No other payment has been made by the defendant. On November 26, 1917, the defendant wrote to theplaintiff, "The first instalment on our contract we believe comes due on December 1st." In that letter also, the defendant writes that owing to certain difficulties he has been delayed in turning out machines, and "would therefore like to ask your kind indulgence if it would be possible for you to extend this first payment until

about the middle of January," etc. On November 28, 1917, the plaintiff wrote to the defendant, "We want to assist you as far as possible in getting started. However, we would appreciate it very much if you could pay us half of the first instalment the 1st of December and the balance the 1st of January."

On November 30, 1917, the defendant wrote to the plaintiff, "We appreciate very much yours of the 28th and shall make settlement as nearly as possible in accordance with the terms you suggest."

On December 14, 1917, the plaintiff wrote to the defendant, "What may be expect from you regarding the matter brought up in our letter of November 28th and your reply of November 30th?"

On December 18, 1917, the defendant wrote to the plaintiff "that he finds a great deal more development work will be necessary before the machine can be placed on the market and does not feel inclined to go any further with the contract and will on receipt of advice begin to get equipment ready for return to Syracuse; that in a few months he may be willing to take up further development and if plaintiff wishes to hold the contract in abeyance he might take it up again later."

On January 22, 1918, the plaintiff wrote to the defendant asking a settlement according to the terms of an enclosed bill and in accordance with the contract. It was admitted by the defendant's counsel that the defendant was in default and that the contract was surrendered on December 18, 1917.

At the close of the plaintiff's evidence, the defendant introduced evidence showing that at no time after the making of the contract were any typewriters made and completed by him.

It is the contention of counsel for the plaintiff that on December 1, 1917 an instalment of $1041.66 became due, and that it was entitled to recover that amount upon the concealed contract. The trial judge was of the opinion that the $1041.66 did not become due as alleged in the declaration upon December 1, 1917, the first day of the quarter, but upon the last day of the quarter; that the defendant was not in default until the last day of the quarter.

There is some conflict in the ideas expressed in the written contract. In the first part the $12,500.00, the balance to be paid is described as "royalties in the sum of $2.50 on each typewriting machine manufactured", and it is provided that royalty payments are to commence upon the first day of the month next succeeding the expiration of one year from the date of the contract. That would seem to suggest that if no machines were manufactured there would be no royalties and so nothing due. But, the contract then goes on, "and quarterly thereafter in an amount to aggregate not less than $1041.66, it being the intent and purpose of this agreement that said sum of $12,500 shall be paid in quarterly payments within a period of three years next succeeding the expiration of one year from the date of this contract." The phrase "to aggregate not less than $1041.66" etc. would seem to mean, in one view of it, that that amount should be paid, regardless of the number of machines manufactured. In other words, that $1041.66 should be paid on the first day of the month after the expiration of one year, as part of the pre-

determined purchase price of $10,000.00.

In the next paragraph which provides for the situation in case of a default by the defendant, it is recited that the contract shall become null and void, and all obligations become extinguished, "except the liability of this second party for earned and unpaid royalties," etc. Does that mean a liability for $2.50 royalty for each machine manufactured, or the quarterly payments of $1041.66? It certainly, taken by itself, apart from the context, suggests quite strongly that in case of a default by the defendant, he should remain liable only for the actual amount of royalties, figured at $2.50 per machine. And that interpretation is emphasized by the further words, in the same paragraph, that in case of default, the plaintiff would be entitled "to collect such moneys as may then and at that time be due and unpaid for royalties on such machines as may then have been manufactured." If there were nothing more to the contract, it would be difficult to hold that the defendant was liable, after making the first payment of $2500.00 for anything further than a royalty of $2.50 for each manufactured machine. And as none were manufactured and entirely completed, there would be no indebtedness. But, there is a final paragraph which is direct, simple and explicit. It provides, first, that the defendant shall render a monthly statement of machines manufactured, and then, secondly, "that no failure of production of machines or royalties during any stated quarter when said payment shall be due shall be considered an excuse for the non-payment of any quarterly payment due, anything in this agreement to the contrary notwithstanding."

Obviously, if "no failure of production of machines or royalties", excuses "the non-payment of any quarterly pay-

ment due", then it was the written intention of the parties that the payment of the balance of $12,500 was in no way dependent upon the amount of royalties or the machines manufactured; and as the payments provided for in the first paragraph were "to commence upon the first day of the month next succeeding the expiration of one year from the date of this contract, and quarterly thereafter in an amount to aggregate not less than $1046.66", there was due, at the time the defendant became in default, the first quarterly payment of $1046.66. "The first day of the month next succeeding the expiration of one year", means what it says, and must be considered as not later than December 1, 1917. Further, the foregoing construction is corroborated by a letter of the defendant. On November 26, 1917, he wrote to the plaintiff, "The first instalment on our contract we believe comes due on December 1st."

We are of the opinion that the plaintiff is entitled to a judgment in the principal sum of $1046.66, and as it was admitted that under the law of the State of New York, such a creditor is entitled to interest at the rate of 6% per annum, the total judgment will be $1046.66, plus interest at the rate of 6% per annum from December 1, 1917, to date.

REVERSED AND JUDGMENT HERE
WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the contract provided that the defendant was to pay the plaintiff $1046.66 on November 26, 1917.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

183 - 25955

ESTELLE KAUFMAN,

Appellee,

v.

JOHN A. MAC FARLANE, doing business as HOTEL KENMORE,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

222 I.A. 640

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Estelle Kaufman brought suit in the Municipal Court for the value of certain property which she claimed was stolen from her room while a guest of the defendant's hotel or lodging house, and recovered a judgment in the sum of $200.00. This appeal is therefrom.

The evidence showed that the plaintiff was a married woman, a resident of Cairo, Illinois and had lived there 26 years; that she came to Chicago on August 4, 1919 on a vacation; that before going she wrote to the Kenmore Hotel, 4618 Kenmore avenue, Chicago, and received information as to rates, but made no definite arrangements till she arrived; that she went to the day clerk and asked what rooms he had; that she registered at the Kenmore Hotel (of which John A. MacFarlane and wife were the proprietors) and was assigned to room 107; that the hotel has an office like a hotel, has a day and night clerk, and a place to leave the keys; that her room was on the first floor, with one window, which opened on a court; that her daughter was with her; that on the same day, after going out for a walk,

she went back to the hotel and her room, and as a rainstorm was coming up, closed the window; that at about 8:30 P.M. she went down, gave her key to the office, and went out on the front porch and stayed there until 8:45 P.M.; that she then went back to her room; that when she entered she saw that the drawers of the dresser had been opened and everything taken out; that she ran back and told Mrs. MacFarlane that she had been robbed; that MacFarlane, the man, came and looked over everything and said he was going for a policeman; that about 10:30 a detective came, and she told him what had been stolen and the value of the things; that an examination of the window showed that it had been opened, and the screen taken out; that when she went out of the room she always locked the door. The evidence, further shows that she stayed in the hotel a week after the robbery; that when she wrote them as to rates, she said she would stay, at the longest, three weeks; that the terms agreed upon were $9.00 per week; that the things stolen were, one blue satin dress, $25.00, one georgette dress, $37.50, one jersey over dress, $35.00, one coat suit, $75.00, one watch, $50.00, one purse containing $2.75.

Counsel for the defendant stated that it was not denied that there were articles stolen out of the room. John A. MacFarlane, the defendant, testified that he was a hotel proprietor, but that in the month of August, 1919, he was conducting a rooming house.

At the close of the evidence, the cause being tried without a jury, the trial judge entered judgment in favor of the plaintiff and against the defendant, in the sum of $200.00.

It is contended by counsel for the defendant, (1) that the evidence fails to show that the defendant was an innkeeper; (2) that the evidence fails to show any negligence on the part of the defendant; and (3) that the evidence shows that the plaintiff was guilty of negligence.

(1) Was the defendant an innkeeper? The evidence shows that the place owned and kept by the defendant had a lobby, an office, a day and night clerk, a register, in which the plaintiff registered, a place to keep keys, and so, all the conventional attributes of an inn or hotel; and, further, was entitled and known as a hotel.

In Gross v. Saratoga European Hotel and Restaurant Company, 176 Ill. App. 160, the court said:

> "The common-law liability of the hotel keeper would seem to be plain, unless one of the two following defenses made by the defendant is good: First, that because, as it is claimed, plaintiff had negotiated a weekly rate for his room while processing a stay of several weeks therein away from his home, which was in another city and state, he did not have the status and consequent rights of a 'guest at an inn'. Second, that although the articles in the suit case which the plaintiff entrusted to the innkeeper were in his custody, care and control, the title to them did not rest in him but in his daughter.
>
> As to the first of these defenses, we are cited by the plaintiff in error to Clifford v. Stafford, 145 Ill. App. 247. It is not necessary to discuss it or to attempt to distinguish it. This court is on record in Moon v. Yarian, 147 Ill. App. 383, as holding to the doctrine which we believe is the better and accepted one, that a weekly rate and a lengthy stay do not, in the absence of taking up a permanent abode at a hotel, take away from a person the status of a 'hotel guest'. This was the position taken by the Court of Appeals of New York also in an elaborate and well-reasoned opinion in Hanson v. Bond, 94 N.Y. 1, which may be considered as the leading case on the subject in the United States since the change in the manner of hotel keeping in modern days, which that opinion points out. It is immaterial therefore whether the rate made by the hotel to the plaintiff was a daily one, as the plaintiff testified, or a weekly one, as maintained by the defendant."

Quite obviously, we think the defendant kept a hotel for the accommodation of transient guests. Where a structure containing furnished rooms, with beds, etc. is advertised as a hotel and is kept open publicly for the lodging and convenience of travelers in general, for a consideration which varies with the rooms agreed upon, and has an office and register, and the conventional employees of a public inn, and is conducted for private profit; legally considered, it is an inn or hotel; and one who goes there and registers and contracts with the proprietor to stay there three weeks at a given rate per week, is a transient guest, and entitled to that care, as to personal property there taken, which the law requires of an inn-keeper. Mann v. Irish, 147 Ill. App. 383. Gross v. Saratoga European Hotel & Restaurant Co. (supra); Hancock v. Rand, 94 N.Y. 1.

As to the claim that the defendant was not negligent:- All that is necessary is to cite the language of Mr. Justice Goodwin in St. George v. Hamburg Am. Line 198 Ill. App. 96,

> "The law of this state, as laid down in Rockhill v. Congress Hotel Co., 237 Ill. at page 102, is that: 'An innkeeper owes the duty and assumes the obligation of safely keeping the property of his guests, and if the property is lost, all that is necessary to make a prima facie case is to show the relation of innkeeper and guest and the loss.'"

Inasmuch as the evidence is uncontradicted that the plaintiff locked the door to her room when she went out, and when she returned in the course of a quarter of an hour, the theft had occurred, it cannot be reasonably argued that she was guilty of contributory negligence.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

212 - 26984

DORA L. RICHTER,
Appellee,

v.

JACOB J. LEISER,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 640

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Dora L. Richter, brought suit in forcible entry and detainer to recover from the defendant, Jacob J. Leiser, possession of the premises known as flat 1, 844 Crescent Place, Chicago. The plaintiff claimed that the defendant had failed to pay the rent for November, 1919 on the first day of that month and was, therefore, in default. A judgment was entered finding the defendant guilty of unlawfully withholding the premises from the plaintiff, and that the right of possession is in the plaintiff. This appeal is therefrom.

The plaintiff and defendant on May 1, 1919, entered into a written lease whereby the plaintiff leased the flat in question from May 1, 1919 to May 1, 1921, with an option for a two years extension. The lease provides for a monthly rental of $47.50, payable in advance, on the first day of each month, at the office of Louis Richter, Chicago.

The lease, also, provides that in case of default in the payment of the rent, it shall be lawful for the

plaintiff (the lessor) at any time thereafter, at the election of the plaintiff, "without notice or demand of rent, to declare said term ended, and to re-enter said demised premises" and dispossess the defendant, the lessee.

The rent for November came due on November 1, 1919, and was not actually paid, and on November 3, 1919, this suit was brought.

It is the contention of the defendant that he went to the home of the plaintiff on Saturday evening, November 1, 1919, between 7:30 and 8 to pay the rent for November, but found no one at home, that the next day, Sunday, about 11 A.M. November 2, 1919, he went there and offered the rent in cash, and was told by the plaintiff that it was too late, that she would not then take the rent.

It is the contention of the plaintiff that the rent was due and payable on November 1, 1919; that she was at home all day and the night of November 1, 1919; that no one came to her home to pay the rent; that on the morning of the 2nd of November, 1919, between 11:30 and 12, the defendant called and offered her the rent, but she told him it was too late; that she had ordered suit brought.

Leiser the defendant testified that on November 1, 1919, he went to the plaintiff's home between 7:30 and 8 P.M., in company with his brother-in-law, and rang the bell, but heard no response; that he knocked on the door and no one answered; that the next day, Sunday, he went there and saw the plaintiff, Mrs. Richter, and said Mrs. Richter here is the rent for November; that he had the cash in his hand; that the plaintiff said, "It is too late, I will not

accept it;" that he, then, said, "Mrs. Richter, we were up here last night to pay the rent and there was nobody home. At least, we got no response to ringing the bell"; and that she answered, "It is too late. I will not take the money".

Sukoff, brother-in-law of the defendant, testified that he went with the defendant between 7:30 and 8 P.M. to pay the rent; that they rang the bell of the plaintiff and no one responded; that they then went upstairs and knocked on the door and no one answered; that on November 2, 1919, he and the defendant went upstairs and found the door partly open; that the defendant knocked and the door opened and he stepped into the hall; that the plaintiff came and the defendant said, "Here is the rent"; that she said "I can't accept it. It is too late"; that at that time the defendant had $47.50 for the rent.

Mrs. Peterson, who lives at 848 Crescent Place, directly across from the plaintiff, testified that as she was coming from a store in November, 1919, about 8 P.M. she met the defendant coming out of the house; that she saw him look up to the third floor; that there was no light in the plaintiff's house; that she and the defendant came back, and she saw the defendant ring the plaintiff's bell; that she was right by him at the time. The plaintiff testified that she and her husband were home all day and night November 1, 1919, and that no one came; that on November 2, 1919, the defendant called and said he wanted to pay the rent, that she said to him, "Mr. Leiser, you are too late. You are supposed to pay on the 1st, and you did not, and I ordered Mr. Richter to bring suit against you." Her husband testified that he was at home all day and on

the evening of November 1, 1919 and no tender was made to him over the telephone or by personal call. The son, Edward L. Richter testified that he was at his Mother's home from 4 to 8:30 P.M. and no telephone message was received by his father or mother and no one came to the door or called or rapped at the door. It was admitted by the plaintiff, through her counsel, that on November 3, 1919 the rent was offered and refused, and that these proceedings were begun on November 3, 1919. Some testimony was introduced as to a conversation between one Verhoeven and the defendant that took place in August or September, 1919, but as it was both irrelevant and incompetent, as it took place at a time when the rent under the lease was not in arrears, it is obviously unimportant and in no way affects the relations of the plaintiff and the defendant as to the payment of the November rent. No oral statement by or for the plaintiff, made in August or September, could modify the written terms of the lease, nor be notice to the defendant of an election to claim a default as to come future payment of rent then not even due.

We are of the opinion that the plaintiff failed to prove by a preponderance of the evidence that the defendant was in default on November 1, 1919. Mrs. Peterson was, apparently, an entirely disinterested witness and she states that on the evening of November 1, 1919, about 8 P.M. she saw the defendant coming out of the plaintiff's house; also, that she saw him ring the bell, and that the house was dark. Her testimony is corroborated by the defendant and his brother-in-law. The only evidence to the contrary is that of the three members of plaintiff's family, that no one called.

We cannot resist the conclusion that the judgment of the trial court was manifestly against the weight of the evidence. Then, too, there was a tender made on November 2, 1919, that is practically admitted. And at that time the defendant had received no notice of an election to terminate the lease. Clark v. Stevens, Gen. No. 28644; Gradle v. Warner, 140 Ill. 123. In the latter case the court said, "after an offer to pay rent, it is too late to declare a forfeiture." When the defendant made the tender on November 2, 1919, there had been no notice of forfeiture. The judgment will be reversed.

REVERSED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

224 - 25936

WESTERN STORE & OFFICE FIXTURE COMPANY, a corp.,

Appellee,

v.

A. L. RANDALL COMPANY, a corp.,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 640

MR. JUSTICE TAYLOR delivered the opinion of the court.

On September 4, 1919, the plaintiff brought suit for a balance of $160.00 due on a contract for work and materials furnished the defendant. The defendant filed a claim of set off in the sum of $523.83 and to that the plaintiff filed an affidavit of merits denying the claim of set off.

On November 25, 1919, the cause was tried before a jury and, upon instructions from the trial judge, a verdict was rendered in favor of the plaintiff in the sum of $145.00 and a judgment entered thereon. This appeal was then taken. No bill of exceptions was filed and all we have before us is the common law record.

Counsel for the defendant in their brief state that upon due incorporation into the record of the bill of exceptions of the proceedings of the trial, it will appear that the trial court misconceived the evidence, and decided the case contrary to the law. No brief has been filed on behalf of the plaintiff. Under the cir-

cumstances it would be contrary to the law for this court to entertain the argument made by counsel for the defendant upon the evidence adduced at the trial, but which evidence is not here before us.

We are therefore compelled, as the common law record shows no error, to affirm the judgment.

AFFIRMED.

O'CONNOR, P.J. AND TIMBERLAKE, J. CONCUR.

287 - 26059

WALTER CROWELL,

Appellee,

v.

AMERICAN BREAD WRAPPING COMPANY, a corp.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

222 I.A. 640

MR. JUSTICE TAYLOR delivered the opinion of the court.

On October 8, 1919, the plaintiff, a chauffeur, brought suit in the Municipal Court against the defendant for a week's wages in the sum of $35.00. On October 16, 1919, the cause was called for trial, counsel appeared for the plaintiff, and one A. B. Petersen, a bookkeeper for the defendant, appeared for the defendant and requested a continuance on the ground that Emil Frisch, the president of the defendant company was in New York City. The continuance was denied and the cause went to trial before the court without a jury.

The statement of claim alleges that the defendant hired the plaintiff as chauffeur at a salary of $35 per week; that the defendant paid the aforesaid weekly amount up to and including August 31st, A. D. 1919; that on September 3d, A. D. 1919, the defendant discharged the plaintiff without cause; that the plaintiff remained unemployed during the balance of that week, unable, after due diligence to procure other employment; that he held himself ready and willing to complete the contract with the defendant, but defendant refused to receive his ser-

vices or pay the weekly amount agreed upon; wherefor the plaintiff claims that there is due and owing him from the defendant the sum of $35.

The plaintiff Walter Crowell testified that he was an experienced chauffeur; that on some day (he did not remember the exact day), during the week of August 17 to 23, 1919, he had a conversation with Emile Frisch, president of the defendant, at the office of the defendant, at which conversation there was present, A. B. Peterson; that Frisch had said that he had hired witness as chauffeur for defendant at $35 per week.

The trial judge then asked Peterson if that was a correct statement, and Peterson said, it was. The plaintiff then further testified that he went to work for defendant, and worked the week prior to August 31, 1919, and was paid $35 for that week, by a check in full of wages up to including August 31, 1919; that on September 3, 1919, he was called into the office of the president, and that said Frisch said to him he was discharged; that no reason for the discharge was stated; that it was groundless; that witness had performed his duties faithfully and diligently; that Frisch handed him a check for $17.50 signed by defendant and containing the words, "in full of all services to date"; that witness then refused to accept said check; that he afterwards received the same by mail and then turned it over to his attorneys; that witness did not work further for defendant; that he was unable to obtain work the balance of that week.

The plaintiff, at the close of his testimony, at the suggestion of the court, surrendered the check to Peterson. No evidence was introduced upon the part of

the defendant. The trial judge then assessed the damages of the plaintiff at $35.00, and entered judgment in his favor for that amount and costs against the defendant. This appeal is therefrom.

The main ground urged for a reversal, according to counsel for defendant, is that the statement of claim does not state a cause of action. The question then arises does the statement of claim sufficiently state a cause of action? We think it does. Counsel for the defendant cites Gillman v. Chicago Railways Co., 286 Ill. 395, and other cases, but we find no principles in them which when applied to the instant case lead to the conclusion that the statement of the case, here in question, is defective. And, further, Ager v. Robinson, 286 Ill. 181, holds that in a fourth class case it unnecessary to allege all the material facts which are to be proved at the trial.

The statement of claim sets forth the names of the parties; that the plaintiff was hired by the defendant; that he was hired as a chauffeur at a salary of $35.00 per week; that the defendant paid the plaintiff up to August 31, 1919; that the defendant discharged the plaintiff without cause; that the plaintiff remained unemployed during the balance of the week unable, after due diligence to procure other employment; that he held himself ready and willing to complete his contract; that the defendant refused to receive his services; that the defendant refused to pay the plaintiff the weekly amount agreed upon; that, therefore, the plaintiff claims there is due him the sum of $35.00.

In our judgment the statement of claim quite

scientifically connotes all the material facts that were involved, and all the law required. A perusal of it would apprise the defendant quite exactly of the dereliction charged; and that dereliction was a breach of a simple contract of hiring. Prolixity in pleading is to be condemned. The defendant could not have misconstrued the pleading, nor have been surprised at the trial, and the evidence merely supported the claim that was quite lucidly made. The words "hired the plaintiff as chauffeur at a salary of $35.00 per week," did not mean a hiring for a single week, but "by the week".

The contention of counsel for the defendant that it was error to refuse a continuance is untenable. What may have transpired before the trial judge on that subject, is not before us, and so we are not able to pass upon that question, and are bound to assume he exercised appropriate discretion.

It is contended by counsel for the defendant that the plaintiff settled his claim by the acceptance of a check for $17.80. The plaintiff, however, testified that Frisch handed him a check for that amount, which contained the words "in full of all services to date", and that he refused it; and that afterwards it was sent to him by mail and he turned it over to his attorneys. The time when it was mailed, the record does not show. At the trial it was turned over by the plaintiff's attorney to Peterson, the bookkeeper of the defendant. In view of the evidence, quite obviously the defendant failed to show what was essential to such a defense that the plaintiff held the check for such an unreasonable length of time that it ought to be considered to constitute a settlement.

Inasmuch as the grounds for this appeal are so unsubstantial that we are forced to the conclusion it was taken for purposes of delay, damages pursuant to section 23, Chap. 33, Hurd's Statutes, will be allowed.

The judgment is affirmed with added damages, in the sum of $3.50.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

307 - 26075

KATHERINE CONNORS,

Appellee,

v.

NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

222 I.A. 640

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Katherine Connors, one of the two beneficiaries named in a beneficiary certificate issued on the life of Joseph E. Maher, brought suit against the defendant and recovered a verdict and judgment in the sum of $1700.00. This appeal is therefrom. It has been before this court once before. It was then reversed and remanded for a new trial. Connors v. National Council, Knights, etc. 218 Ill. App. 69.

The declaration alleges that on August 21, 1909 the defendant issued a benefit certificate to Maher, a member of the defendant society, in the sum of $3,000.00 which was payable to his two sisters; (one of whom is the plaintiff) and that he died on December, 1910. The defendant filed the general issue and thirteen special pleas. Certain replications, demurrers, rejoinders, and a similiter were subsequently filed; and certain orders entered thereon. The plea of the general issue was withdrawn by the defendant, and it was admitted that the plaintiff had made out a prima facie case, under her pleadings, and that there was due, if anything, the sum of $1700.00. When this case was formerly

before us, a judgment for the plaintiff was reversed because the trial judge ruled that all the evidence going to show that the insured, at the time of his application, had a brother already deceased, should be stricken out. In the second trial, evidence on that subject was admitted, the jury was instructed that the question in the application "How many (brothers) dead", which was answered "none", referred to a matter which was material to the risk. There is no doubt that Joseph W. Maher at the time he made his application on August 5, 1909, had a brother, Patrick Maher, who, on March 29, 1907, died of myocarditis.

Inasmuch as the application for insurance, which was signed by the deceased, contained in answer to the question "How many dead" (meaning brothers), the word "none" the question arises whether by evidence introduced the plaintiff avoided the effect of the written negative, so as to justify the verdict of the jury in her favor.

In Grand Mutual Life Insurance Co. v. Wagner, 180 Ill. 133, where the court had under consideration a similar situation to the one in the instant case, the question and answer being the same, language was quoted from Fowler v. American Life Insurance Co., 111 U.S. 335, to the following effect, that the insurance company was entitled to "the utmost good faith towards it," that he would "make full, direct and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation or concealment of facts with which the company ought to be made acquainted, and that by so doing, and only by so doing, would he be deemed to have made fair and true answers." The court then said in the Globe case, (supra)

> "In that case the untrue statements were held to be representations, and not warranties, and we think, on the same reasoning, the answer here in question should be so held, and in the absence of proof by the company of fraud or intentional misstatement on the part of the insured the policy was not rendered invalid merely because the answer proved to be false."

The subject, in general, is discussed elaborately in Joseph v. New York Life Ins. Co., 219 Ill. App. 452, and it is there stated that "the question in each case is whether the answers made . . . were knowingly false."

The question then arises was Joseph M. Maher guilty of fraud or intentional misstatement as to the answer which appears in the application, that, at the time, he had never had a brother who had died. The written application, itself signed, as it admittedly is, by the deceased, is prima facie proof of an intentional misstatement; and the burden of introducing evidence to overcome that proof is upon the beneficiary, the plaintiff.

There are three matters of fact to be considered; the testimony of the plaintiff, that of Dr. Corcoran, and the signed application. The latter states that the deceased had no brother dead. Katherine Connors, the plaintiff, said that Dr. Corcoran, the examining physician for the defendant called at the home of herself and her brother Joseph and examined him with instruments and asked him questions; that as the doctor was writing she was standing within two or three feet; that the part of the application containing the family record was not filled out at her home; that she thinks he filled that out according to hers; that he had examined her before. She further testified, on cross examination, that her brother put in his name at the top and

signed it at the bottom; that the part of the application beginning with "family record" down to the words "if any part of the above questions" was not filled out at her house; that the doctor was at her house before Joseph came into be examined and was sitting writing on the application when Joseph came in; that the Doctor had examined her before that; she thinks the Doctor filled out the family record according to here as he had examined her before. On cross-examination she testified that the name at the top, Joseph H. Mayer, was written by her brother but that she does not think the rest of the answers in blue ink to questions 2-3-4-5 and 6 were written by Joseph H. Maher; that she thinks those were written by the Doctor who was examiner for the society; that the family record in question 8, which contains the question as to brothers, is in Dr.Corcoran's handwriting; that it is not in that her brother; that the answers to questions 9 and 10 which were in black ink, were not written by her brother but were probably, as far as she knows, written by Dr. Corcoran; that she does not know who wrote in the answers to questions 11 to 30 which are in blue ink; that she saw her brother sign his name to the application; that she does not know whether when he signed it at the bottom it was entirely blank with the exception of his name at the top. She further testified that she thought her brother wrote in the words $1500.00 Mrs. Mary Teuhey, $1500.00 Mrs. Katherine Connors; that at the time he signed the application the only writing on it was where he had signed his name at the top and bottom and the statement of the amounts and the beneficiaries. Then again, she testified on cross examination that she thought all the blue writing looked like her brother's, as it looks very much like her brother's hand-

writing and that it was on there before the application was signed, and that the writing in black, being the family record, was not on the application when the Doctor took it away with him; that she did not see the Doctor write anything on the application; that she only saw him write on here; that she remembers the Doctor said in regard to the family history, "That will be the same as your sister's"; that her brother answered, "Yes".

An application of the plaintiff signed by her and dated August 13, 1909, eight days later than that of her brother was also offered in evidence. It was certified to By Dr. Corcoran, and also recites the question, "How many brothers dead?" and the answer "None", the same as appears in the application of the deceased, her brother. When asked about her own application she stated that the date August 13, 1909, is wrong; that she and her brother were examined on the same day; that she is not able to say whether the answers which were in blue ink from 1 to 6 were in at the time she signed but she thinks they were; that she thinks it was all filled in before she signed it; that she could not say whether the answers to questions 9 and 10, which were in black ink, were filled in before she signed them or whether the answer to questions from 11 to 27, which were in blue ink, were filled in before she signed it; that her last recollection is that the application was all filled out before she signed it "but I am not sure"; that the Doctor got the information as to the family history he used in filling it out from her; that she did not tell the Doctor that she had no brothers dead; that she does not know where he got the information or "misinformation" that she had no brothers dead.

Dr. Corcoran, a physician and surgeon of seventeen years practice, stated that asmedical examiner for the defendant, he examined the deceased; that the application in question bears his signature and, also, the one of Katherine Connors bears his signature; that each was written on the date set forth in the application; that the answer "none" in the deceased's application, he wrote; that at the time the deceased signed the application, all the writing was there that is on there now and that the paper was in the same condition when the deceased signed it, that it is now; that the same is true of the application of the plaintiff; that he got the information that the deceased had no brother, dead, from the deceased himself; that he did not write in the family history after the deceased signed it, nor did he have in his possession a record of the family history. On cross-examination he said that at that time he had been an examiner for the defendant for five years; that sometimes he would examine 8 or 10 a day and then none for three or four weeks; that as to the application in question, he has no distinct recollection as to where it was made out, though he thinks it was at the house of some relatives; that he could not tell who was present; that about all the recollection he has about the paper, is from looking at the paper itself; that he does not remember the man or his description at all; that the date he gets from the paper itself; that he got all the refreshing of his recollection, from the paper itself; that he had no distinct recollection of what took place, where it was or when it was, aside from the paper. On re-direct he said that as far as he remembered, he never dated an application on a date different from that on which it was made; that it was his practice to date them the day

the application was made; that he does not remember a single exception. He further testified that the answer to the questions 1 to 6 inclusive in the application of the deceased, and which are in blue ink are not his handwriting; that the family history in answer to question 8 and which is in black ink is his handwriting, also the answer to questions 9 and 10 as to certain diseases which is in black ink; that the answers to questions 11 to 27, both inclusive, and which are in blue ink are not his handwriting; that he wrote in the name of the beneficiary in answer to question 30 which is in blue ink, and that the place and date, Chicago, Illinois, August 5, 1909, and which is in black ink he wrote. He further testified that the application was in the same condition at the time the deceased signed it as it is now, and, further, that the application of Katherine Connors, which she says is not his handwriting all except her name at the bottom, was all filled out before she signed it; that he did not, after the name, Joseph M. Maher, was signed to it, take the application and fill in the answers to question No. 8 pertaining to the family history.

In the original application of Joseph M. Maher, the deceased, the answers to the first seven questions are written in blue ink; whereas answers to questions 8 and 9, which include the question, How many dead? (brothers) and the answer, None, are in black ink; and the answers to questions 11 to 30 both included, are in blue ink; the place and date, Chicago, Ill., August 5, 1909; and the signature of M. A. Corcoran, M.D. as medical examiner, are in black ink. The signature of the application, being that of Joseph M. Maher, is in blue ink.

In the original application of Katherine Connors, the answers to the first 8 questions, including the question, "How many dead?" with the answer, "None", are in blue ink; the answer to the questions 9 and 10 are in black ink, and the answer to questions 11 to 30 both included, are in blue ink. The place and date, Chicago, Illinois, August 13, 1909, and the signature of the medical examiner, E. A. Corcoran, are in black ink, and the signature of the applicant, "Katherine Connors" is in blue.

It will be seen that there is a serious conflict in the evidence as to whether the deceased signed the application after the answer "none" was written. Of course, if it were written in after he signed it and without his knowledge and consent, or direction, he would not be chargeable with any evasion or misrepresentation. The two applications show two very different kinds of ink were used in filling in the answers and blanks, and suggest quite overwhelmingly that they were not all filled out at the same time and place. The answer "none" in the application of the deceased is in black ink, and it may well be that all the writing in that application in blue ink was done at the home of the deceased and that in black ink somewhere else. The doctor in his testimony stated, that he had no recollection of the particular circumstances, he merely recalled what was his general practice; on the other hand the plaintiff says the word "none" in black ink is not her brother's handwriting and that she thought all the writing in blue ink looked like her brother's, and that the writing in black, being the family record, was not on the application when the doctor took it away with him.

It is true that there is some evidence on the part of the plaintiff as to the doctor getting the family history

of the deceased from the plaintiff herself but there is no evidence that the deceased if he answered "yes" when the doctor asked the question, "Well, your history would be about the same as your sister's?" knew anything about the answer which the plaintiff had made in her own application.

The question, whether the deceased was responsible for the answer "none", was one peculiarly apt for determination by the jury, and, inasmuch as there are certain serious discrepancies in the evidence put in to show that the deceased signed the application when it contained the answer "none", or was responsible for that answer, and the jury found for the plaintiff, we, who are not in as good a position as the jury were, do not feel justified in holding their verdict to be clearly against the weight of the evidence.

It is contended that the deceased, by failing to pay the August assessment on or before August 31, 1910, was suspended, and that, if not in good health on October 20, 1910, he was not, therefore, in good standing at the time of his death. It is conceded that on October 20, 1910 he paid his assessments for the months of August, September and October, 1910. On October 29, 1910, he was admitted to the Cook County Hospital, and on November 15, 1910, was transferred to the tubercular ward. Quite a volume of evidence was introduced as to his general habits and his health and condition at the time he entered the hospital. There is some conflict in it, but it was presented to, and passed upon by the jury, and we feel sure, after carefully considering it, that we are not justified in concluding that the jury was wrong in its determination thereon. Court of Honor v. Dinger, 221 Ill. 179.

It is contended on behalf of the defendant that instruction number 1, given on behalf of the plaintiff is erroneous. Inasmuch, however, as the burden of introducing evidence is under its pleas in support of the claim that the deceased was guilty of misrepresentation was upon the defendant, it was highly proper that the jury should be instructed that the burden of proof was not upon the plaintiff to show that the alleged defense of the defendant was not true, we are of the opinion that that contention is unfounded.

It is contended by counsel for the defendant that instruction number 4, given on behalf of the plaintiff is erroneous. The particular words objected to are, "The court instructs the jury that you are not required to believe any statement to be a fact simply because any witness or witnesses, has or have sworn it to be a fact if you believe from the evidence that such witness or witnesses has or have wilfully and knowingly sworn falsely to such alleged fact." That is good law. Devaney v. Otis Elevator Co., 251 Ill. 38.

It is contended by counsel for the defendant that the court erred in refusing to give instruction numbered 15, offered on behalf of the defendant. We are of the opinion that that contention is untenable inasmuch as instruction numbered 10, given on behalf of the defendant, sufficiently covered the principle involved.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

327 - 26099

STOERK - BIRON COMPANY,
a corporation,

Appellee,

v.

ALEXANDER MARKETING COMPANY,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 641

MR. JUSTICE TAYLOR delivered the opinion of the court.

Having paid $1021.80, for a car of cucumbers, the plaintiff brought suit against the defendant for damages, claiming that the cucumbers were not as contracted for, and recovered a judgment in the sum of $409.76.

On May 23, 1918, at San Benito, Texas, the defendant received the following telegram from its agent in Chicago, "Stoerk offers $1.60, F.O.B. two cars crates cucumbers prompt shipment freight shipment." The defendant on May 25, 1918, telegraphed back, "Confirm Stoerk Friaco 1907 contains cucumbers 489 crates, 126 bushel baskets invoice crates $1.60 as sold baskets $1.90 if not satisfactory advise quick."

On May 27, 1918, the defendant shipped a carload of cucumbers containing 489 crates and 126 baskets from San Benito, Texas, F.O.B. to the plaintiff at Chicago. It is admitted the car was properly iced, and arrived promptly. At the time the car was sent, the defendant sent to the plaintiff a bill of lading and a draft which

provided that on arrival of the car the plaintiff should pay to the First National Bank of Houston, or order, the sum of $1021.80. The car arrived in Chicago on June 3, 1918, and on an application by C. H. Robinson Co., agent of the defendant, an inspection of the car was made. On June 4, 1918, one Samson, a U.S. Food Products Inspector, made the inspection and in his written certificate, dated June 4, 1918, and which is addressed to the defendant, it is recited that he inspected car No. 1907, on the C. & E. I. team track, 14th street; that the pack was full; that "An average of 4% stock was misshapen nubs and crooks" and an additional 3% showed soft withered ends", and that there was an occasional cucumber starting to decay apparently as a result of bruises. Otherwise, his certificate contained no criticism. One Genseke, an employee of the plaintiff, also, inspected the car while it was on the tracks. He testified that the cucumbers were not "No. 1"; that he made a very careful inspection.

The plaintiff paid the draft and took out the cucumbers. He sold one half of the carload to one Ford, who paid one half of the amount of the draft. Half the carload was then delivered to Ford's place of business, and the other, to the plaintiff's. Livingston, a food administrator of the State, employed by the Federal Government, testified that when the car was first received the plaintiff refused it, and that he ordered an inspection, the one made by Samson; that the plaintiff still refused it; that he then inspected the car himself, and found what Samson reported; that he made a further inspection a day or two later, on South Water street, in plaintiff's store; that he ordered his inspectors to make another in-

spection - it was made June 7, 1918 - and said, "There is quite a few culls in there, to my estimation, and I don't think we got a good delivery"; that he called one Tebbins, the defendant's Chicago agent, and asked him if he wanted to adjust the matter; that Tebbins refused, and he, Livingston, then told Stoerk, he would have to take the cucumbers - he had already paid the draft - and said further, "You can fight it out later", that on the second inspection he found a large percentage of culls; that he was not interested in the matter of decay, because the car was bought F.O.B. shipping point, that they were not "fancy No. 1".

The certificate of Davidson, inspector, who made the second inspection, on June 7, 1918, recited, as far as is here material, that "about 10% of stock badly misshapened (nubs and crooks)". It also recited that "between 15% - 20% showed soft wrinkled ends."

Stoerk testified that he bought a carload of cucumbers through Tebbins; that he told Tebbins he would "buy a fancy car of cucumbers providing I can get good quality"; that Tebbins said, I will wire you offer or order, and "I will assure you that the quality will be as good as - fine as silk. It is A.No.1, stuff"; that after the car came, on June 4, 1918, he inspected it; that he was dissatisfied and took the matter up with Livingston, the food administrator; that he told him that under the administration ruling he, Stoerk, had to accept the car and adjust the matter afterwards; that he then took the car; that among the cucumbers there were quite a number of culls, cucumbers that are small and not quite fully matured, that about 25% were decayed; that they were not uniform in size and were not No. 1,fancy. Ford testified that he bought half the cucumbers; that

half of what he got were culls, and the other half No. 2's; that they were not No. 1; that some showed decay, shriveled ends; that 10 to 15% were decayed; that the shriveled ends were due to the cucumber aging, being picked from the vine too long; that the value of the cucumbers would be affected by the fact that they came in crates of different sizes, that they were not uniform. Turabull, manager for defendant testified, by deposition, that the cucumbers were fully up to the average when shipped; that he inspected them; that there were no wrinkled or shriveled cucumbers, or with soft ends, at the time of the shipment from San Benito, Texas. Pinney, former secretary and joint manager of defendant, testified that he inspected them as they were being loaded into the car; that the quality and grade were good; that the car at the time it left was in good condition; that cucumbers are not graded as No. 1; that they are considered as fancy and short grades.

Tebbins, the Chicago agent of the Alexander Marketing Company, and doing business as C. H. Robinson Company, testified that he saw Stoerk and the latter said he would take a car, by freight, and if the cucumbers were of good quality he would take them and pay $1.00 a crate. When asked as to whether Texas cucumbers were graded as No. 1, 2 and 3, he testified that, to his knowledge, they were not; that the only grade he knew was "good cucumbers". On the subject of inspection he testified that on the afternoon of June 3, 1918, when the car arrived, he heard that Stoerk complained, and, also that Stoerk called him up and said that they would not accept the car; that he, Tebbins, then ordered a government inspection and made an inspection himself and concluded that the condition of the merchandise con-

stituted a good delivery; that there were some shriveled, misshapen and damaged cucumbers, but that such is not uncommon where a car has been on the road eight days.

On the subject of what the cucumbers were worth, Geneske and Ford said they were worth from $1.00 to $1.50 a crate, while Stoerk testified that they were worth $1.00 a crate.

At the close of the evidence the trial judge assessed the plaintiff's damages at $409.76 and entered judgment therefor.

The evidence as to just what the contract of purchase and sale was is somewhat conflicting inasmuch as Stoerk testified that he told the defendant's agent, Tebbins, that he would buy a car of cucumbers providing they were all good quality and "A. Number 1, Fancy Quality", and that Tebbins told him he would wire his offer or order and that he would assure him "that the cucumbers will be as good as - fine as silk. It is A. Number 1 stuff," and on the other hand Tebbins testified that when he saw Stoerk, the latter stated he would take the car by freight if the cucumbers were all good quality, and, further, that Texas cucumbers were not graded as Number 1, 2 and 3, but only as "good cucumbers." Of course, the two telegrams, the one sent by Tebbins to the defendant and the one sent by the defendant to Tebbins, cannot be considered as any evidence whatever against the plaintiff as to what the oral contract was that was made between Stoerk for the plaintiff and Tebbins for the defendant at the time of their conversation. In view of the conflicting evidence as to the conversation between Stoerk and Tebbins, we do not feel justified in concluding that the trial judge was not warranted in believing the testimony on behalf of the plain-

tiff rather than that on behalf of the defendant.

The question then arises whether the cucumbers at the time they were shipped were of the quality agreed upon. Inasmuch as the cucumbers were bought F.O.B., whatever transpired after May 27, 1918, when the carload was shipped, in the way of deterioration and decay, is immaterial.

Turnbull, the manager for the defendant, stated that he inspected the cucumbers and they were fully up to the average when shipped. Likewise Finney, an officer of the defendant, stated that he inspected them as they were being loaded into the car and that the quality and grade were good then and at the time the car left. On the other hand Genaske, an employee of the plaintiff, who inspected the car while it was on the tracks in Chicago, says that the cucumbers were not No. 1; and Sampson a U.S. Food Products Inspector, who made an inspection on June 4, 1918, says that his examination showed over 4% mis-shapen, nubs and crooks, and that an additional 3% showed soft withered ends. Livingston, a U.S. Food Administrator, corroborated Sampson, and after ordering another inspection, stated that he did not think that the plaintiff "got a good delivery", and that as a result of the inspection he asked Tebbins, the agent of the defendant, if the defendant wished to adjust the matter, and that, upon Tebbins refusing, he told Stoerk that the plaintiff would have to take the cucumbers and fight the matter out later. Livingston further stated that the cucumbers were not "Fancy Number 1."

The written inspection of one Davidson, which is dated June 7, 1918, recites that "about 10% of stock badly mis-shapened (nubs and crooks)".

Ford, who bought half the cucumbers from Stork stated that half of what he got were culls and that the other half were number 2's; that 10 to 15% were decayed; that some had shriveled ends which were due to being picked from the vine too long.

It is quite obvious, therefore, that there is a serious conflict in the evidence as to the condition of the cucumbers at the time they were originally shipped; and, considering all the evidence, weighing it as well as we may, we do not feel justified in concluding that the trial judge erred and that the judgment is manifestly against the weight of the evidence.

It is contended on behalf of the defendant that, as the car of cucumbers was actually physically taken by the plaintiff, it must be considered as having legally accepted it. Under the circumstances, however, bearing in mind the evidence and that the plaintiff was requested, practically ordered, by a member of the Food Commission, to take the merchandise, we are of the opinion that it cannot now reasonably be urged that the plaintiff's failure actually to refuse to take the car now estops him in any way from showing that the defendant failed to comply with the requirements of the contract.

As to damages: The plaintiff was entitled to prove up as damages the difference between the market price in Chicago of a car of cucumbers such as he contracted for and the market price of the particular car of cucumbers which he received. The evidence does not show the former but does show the latter. Apparently counsel for the plaintiff undertook to prove up the difference between the actual

contract price of the car and the market price of the particular car which he received. That, of course, does not conform to the requirements of the law; but as the plaintiff was in the commission business in Chicago and undertook to buy a car of cucumbers in the regular course of its business, and for the purpose of making a profit, we think it but fair to assume under the circumstances that the market price of a car of cucumbers such as it contracted for was worth more in Chicago than the purchaser paid for them, that is at least $1021.40, and, therefore, that the measure of damages as contended for by the plaintiff was not to the disadvantage of the defendant.

Counsel for the defendant claim that certain items, such as freight, etc. were included in the judgment, but they do not point out anything in therecord tending to show that fact.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

472 - 25733

HENRY J. VAVRINEK,

Appellant,

v.

W. J. McGOVERN and W. A. KENNEDY,

W. A. KENNEDY,

Appellee.

CIVIL FILE

MUNICIPAL COURT

OF CHICAGO.

222 I.A. 641

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action by the plaintiff Vavrinek, the payee, in a judgment note signed by the defendants McGovern and Kennedy. There was originally a judgment by confession against both defendants, after which, on motion of the defendant Kennedy, the judgment was opened up as to him and leave was given the said Kennedy to make a defense. Thereupon, issues were joined and the cause was heard before a jury, resulting in a verdict in favor of Kennedy. Judgment was entered accordingly, to reverse which the plaintiff has perfected this appeal.

It appears that the defendant, McGovern, was in the saloon business with one Hopp. For some time he had been purchasing beer from the Pilsen Brewing Company in which the plaintiff, Vavrinek, was a stockholder. McGovern wished to buy out the interest of his partner, Hopp, in the saloon and for that purpose he needed the sum of $1,500. In that connection he conferred with John A. Cervenka, president of the brewing company. The latter arranged a loan of the amount stated,

from the plaintiff to McGovern. Vavrinek was by occupation a merchant tailor. The brewing company did business on the cooperative plan and each stockholder was required to be a saloonkeeper or have some saloonkeeper, who was not a stockholder, take the product of the brewing company. In this connection, McGovern entered into a written contract with the plaintiff Vavrinek, by the terms of which he agreed to purchase all the beer that he might sell or otherwise dispose of in his saloon, for a period of five years, from the plaintiff and it was provided that this beer was to be the product of the Pilsen Brewing Company and McGovern further agreed to pay for this beer at the rate of $1.00 above the regular market price, until 1,500 barrels had been delivered. On July 31, 1913, the parties met in the office of Mr. Cervenka at the brewery to consummate this contract and also the loan which would enable McGovern to buy out his partner. At this time, Kennedy, who was a friend of McGovern, was present. McGovern signed the contract and he and Kennedy signed the note in question. Neither McGovern nor Kennedy denied their signatures to the note. It was Kennedy's contention, however, and in this he was supported by McGovern, that there was no mention of a note upon that occasion and both defendants contend that they did not know a note was being executed. It is Kennedy's further contention that something was said on the occasion referred to, about McGovern having someone guarantee that he would fulfil his contract and that when he, Kennedy, placed his signature on a paper, as requested at that time, he was given to understand and believed that the paper was such a guaranty. The defense interposed by Kennedy to the action on the note was that his signature had been obtained to the note by fraud and misrepresentation.

This presented an issue of fact forthe jury to determine. In support of the appeal the plaintiff contends that the finding of the jury on that issue is against the manifest weight of the evidence. The plaintiff first testified that when the defendants signed the notes at the office of the brewery, he delivered two checks to McGovern aggregating $1,500 in amount, and he later testified, upon his recollection being refreshed, that the checks were not delivered at that time but were delivered at the saloon of McGovern, at which time he had McGovern endorse the checks and he, the plaintiff, thendelivered them to Hopp.

McGovern testified that at the time he went to the brewery office he asked Kennedy to drive him over there but that nothing was said as to the nature of his errand; that after they arrived at the office there was some discussion about the contract he was to enter into, agreeing to purchase the product of the Pilsen Brewing Company; that after he had executed the contract, "they suggested that Mr. Kennedy act as guaranty for me to use that kind of beer"; that Mr. Cervenka said, "It is only to see that McGovern uses this amount of beer"; that nothing was said at that time about a note and that he did not know there was a note; that he received no money or checks at that time but did receive the checks the following evening; that nothing was ever said in his presence to Kennedy about signing a note for the money he, McGovern, was borrowing; that when Kennedy signed the paper at the brewery office it was stated that he was signing a guaranty to a contract that he (McGovern) would handle 1,500 barrels of beer within the contract period.

Plaintiff was called to the stand by the defend-

ant, under section 33 of the Municipal Court Act, and testified that he told McGovern he would loan him $1,500 to buy out his partner "if he would bring me a good guarantor"; that the note and the contract to take the beer were necessary before he would let McGovern have the $1,500; that at the time the contract was signed he did not exhibit the two checks to Kennedy or tell him that he was signing the paper guaranteeing the note for the money he was loaning McGovern; that Kennedy was not present when he told McGovern that if he had a guarantor he would let him have $1,500; that he said nothing to Kennedy "because he was old enough to know"; that Cervenka told Kennedy "that that guarantee of $1,500 that he is signing on the note, that is what he told him."

Kennedy testified that the first time that he knew he had signed a note was in October, 1915, when he received a letter from the plaintiff's lawyer demanding payment of the note, which the letter stated had been executed; that at the time he went to the office of the brewery with McGovern on July 31, 1913, Cervenka stated they had entered into a contract with McGovern to use their beer, exclusively, in his saloon for the period of five years and would like to have him sign as a guarantee that he would live up to the contract; that he, (Kennedy) replied that he could not act as a guarantor as he was not worth anything, whereupon Cervenka said, "All we ask you to do is that you guarantee that he will use our beer there, that he will not switch breweries on us"; that he thereupon replied that he guessed he would have influence enough with McGovern to keep him from doing that and he signed the paper on the table at the place which was indicated for him to sign; that McGovern signed first and

then he signed; that nothing was said about the plaintiff loaning McGovern any money, either before or after he had signed his name; that no checks were handed to McGovern in his presence and that he did not know that McGovern was borrowing money or that he was acting as security for money borrowed; that neither Cervenka nor the plaintiff told him he was guaranteeing the payment of a note for money which was advanced to McGovern; that he went to the brewing company's office on this occasion because he had a car and McGovern asked him to drive him over; that he did not read the paper he signed.

In rebuttal, Cervenka testified that upon the occasion of the visit of McGovern and Kennedy to theoffice of the brewery, he explained to Kennedy that McGovern had advised him that he had bought out his partner in the saloon business and that he wanted to borrow $1,500 to make the necessary payment; that he told McGovern that the brewery would not loan him the money but that he could procure it from one of their stockholders providing that he could get some security and that McGovern informed him that he thought he could get Kennedy to go on his note for that money; that he also advised Kennedy that McGovern was to enter into a contract with the plaintiff to purchase beer from the Pilsen Brewing Company, for a term of five years and if he carried out that contract, the plaintiff would pay McGovern a certain bonus for its performance and that would help McGovern pay off the money borrowed; that he remarked to Kennedy that he knew McGovern better than he (Cervenka) did and that "if he had faith in him that he could conduct his business for five years, that of course Mr. McGovern would carry out the contract and pay the money"; that McGovern told Kennedy he

ought to know he would be able to make the money and he should sign this guaranty for him and finally Kennedy agreed to sign the note and he then did so. On his cross-examination, Cervenka testified that McGovern told Kennedy he thought the latter knew that he could do business in his saloon and that he would be able to meet all his obligations and he asked Kennedy to do him that favor "and sign this guaranty, sign this note with him"; that he told Kennedy, at that time, that the plaintiff was going to give McGovern $1,500. The plaintiff was recalled to the stand and testified that Cervenka explained to Kennedy what his proposition with McGovern was and that the latter wanted a loan of $1,500, and that if McGovern would have someone sign the note, he could get the money and Kennedy said he would sign it; that neither he nor Cervenka said that all they wanted Kennedy to do was to sign an agreement guaranteeing that McGovern would purchase 1,500 barrels of beer in the next five years.

This was an action by the original payee of the note and no interests of third parties were involved. On this evidence it could not be said as a matter of law that the defendant had failed to make out a defense and therefore the trial court did not err in denying the plaintiff's motion for an instructed verdict. It was for the jury to determine on this conflicting evidence, whether or not the defendant had been induced to sign thepaper in question on the representation that something was wanted in the way of a guarantee that McGovern would fulfil his contract. The jury determined that issue in the affirmative but in our opinion the jury's verdict on that issue is clearly against the manifest weight of the evidence.

Although this judgment must be reversed,

judgment for the plaintiff cannot be entered in this court as plaintiff requests, but the cause will be remanded for a new trial. The defendant Kennedy set forth the nature of his defense in his affidavit in support of his motion that the judgment be opened up and he be given an opportunity to defend. Upon that motion being allowed it was ordered that this affidavit stand as Kennedy's affidavit of merits. It was part of his defense, as set forth in his affidavit, that McGovern had used 311 barrels of beer under his contract and that he was still willing to use the beer of the Pilsen Brewing Company, until the expiration of the five year period covered by the contract. Of course on that proposition, the contract itself is competent as evidence as well as any other testimony showing to what extent the contract was performed by McGovern, if any. As this action is between the original parties to the note, and Kennedy's position is that of a surety, he would have a good defense to the extent of such performance as he could show McGovern had made under the contract. In our opinion the contract was also competent on the issue involving the alleged false representations.

Plaintiff, on this appeal, complains of the action of the trial court in admitting in evidence, over his objection, a chattel mortgage, contending that the evidence shows that the mortgage was given to secure another loan McGovern had arranged with Cervenka for $800 with which to renew his saloon license. McGovern denied this and testified the mortgage was given "to protect the fifteen hundred dollars." In our opinion it was error to admit this testimony. It was not denied that the chattel mortgage was given some months after the defendant Kennedy signed the note in question.

That being the case, he had no interest in the chattel mortgage nor was he concerned with it in any way, for the giving of the chattel mortgage, even assuming that it was for the purpose of further securing the plaintiff on the $1,500 loan, could not have operated as any inducement to Kennedy, in the matter of signing the note sued on. For that reason, the evidence relating to the chattel mortgage and likewise that relating to the judgment later recovered in another case against McGovern and the proceedings following that judgment, was incompetent and immaterial. The error in admitting this testimony was hardly cured by the action of the court, at the close of the trial, in striking it out, for the jury may well have got the impression that the plaintiff, having secured the advantage of some additional security, without improving that advantage should not be permitted to recover from the surety.

For the reasons stated the judgment of the Municipal Court is reversed and the cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

No. 25768

JAMES G. DRIVER, Administrator of the Estate of Mary A. Culhane, Deceased,

Appellee,

v.

CHICAGO CITY RAILWAY COMPANY and CHICAGO RAILWAYS COMPANY,

Appellants.

APPEAL FROM

[illegible],

COOK COUNTY.

222 I.A. 641

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, as administrator of the estate of Mary A. Culhane, deceased, brought suit, in an action on the case, against the defendants to recover damages under the Injuries Act for the benefit of the next of kin of deceased, for her death, caused by the alleged negligent acts of the defendants. By this appeal the defendants seek to reverse the judgment for $5,000, recovered by the plaintiff.

In support of the appeal the defendants urge that the trial court erred in giving certain instructions and that the verdict is against the manifest weight of the evidence in that the evidence shows that they were not guilty of negligence and fails to show that the parents of the deceased, who was a little girl aged four years and eight months, were in the exercise of ordinary care for her safety. They also urge that the trial court should have held as a matter of law, under the evidence, that the parents of the deceased were guilty of contributory negligence and that therefore the plaintiff could not recover.

Archer avenue is a street running in a southwesterly

and northwesterly direction, in the City of Chicago. The defendants maintained and operated a double track, electric street railway on that street. Robey street runs north and south and crosses Archer avenue at an angle. Some 335 feet southwest of the intersection of Archer avenue and Robey street, on the northwest side of Archer avenue, is a building referred to in the evidence as a post office. Between the intersection and that building, the property is all vacant. On the day in question, January 17, 1917, several workmen employed by the City of Chicago, were repairing a catch basin in the northwest roadway of Archer avenue, about 150 feet southwest of Robey street.

It is the theory of the plaintiff that the deceased walked along the northwest side of Archer avenue to the west crosswalk of Robey street and then proceeded to walk south across Archer avenue, when a car belonging to defendants and proceeding southwest along Archer avenue struck her; that her body caught in the fender or in some other manner under the car and that the car proceeded until it was over 100 feet beyond the point where the catch basin was being repaired, before it came to a stop. It is the theory of the defendants that the deceased was skipping along the northwest sidewalk of Archer avenue in a northeasterly direction and that a few feet before she reached the point where the catch basin was being repaired, she paused a moment or two at the curb and then skipped directly across Archer avenue into the path of the car, which was only a car length or less away at the time she left the curb and that there was no indication that the child was going to cross the street until that moment and that it was then impossible to stop the car in time to avoid striking her.

The evidence on the question of defendant's negligence was in sharp conflict. We shall not attempt to analyze it here. We have carefully considered all of it and in our opinion, we would not be warranted in disturbing the verdict on this issue. Nor would we be warranted in holding that under the evidence the parents of deceased were guilty of contributory negligence as a matter of law. The evidence on that issue should have been submitted to the jury under proper instructions. However the court's instructions were such as to practically eliminate that issue from the jury's consideration.

Given instruction 8 was to the effect that the deceased "had as much right to be upon the street, as had the defendant street car company." To say the least, this instruction was very misleading. The issue being tried before the jury included the question of whether the parents of the deceased were in the exercise of reasonable care for her safety, in permitting her to go unaccompanied along a street where electric street cars were frequently passing. The instruction makes a statement which is quite out of harmony with the fact that there could be no recovery by the plaintiff, unless he showed by a preponderance of the evidence that the parents were in the exercise of reasonable care, on the day in question. The instruction should not have been given. Kessing v. Mississippi Valley Traction Co., 139 Ill. App. 278.

By instruction 11, the court told the jury that if they believed from the evidence that at the time of the accident the deceased was a child of about the age of five years, then she could not, because of her tender years, be guilty of or charged with carelessness or negligence, so as to relieve at all any want of due care on the part of the defendants, "so that

if the jury further believe, from the evidence that the accident causing the death of Mary Culhane was due to the want of ordinary care by the defendants, as charged in the declaration, then you must find a verdict for the plaintiff, and no want of care by Mary Culhane will save the defendants from liability for the accident."

Such an instruction was entirely improper in a case brought by an administrator for the benefit of the parents or next of kin, for in such a case there can be no recovery, notwithstanding there is proof of the defendants' negligence, unless it is also shown that the parents of the deceased child were in the exercise of reasonable care for her safety. This being a peremptory instruction to find for the plaintiff, and excluding the necessary element of the exercise of reasonable care on the part of the parents, it was reversible error for the court to give it. Carlin v. Chicago Railways Co., 208 Ill. App. 303. In support of this instruction, counsel for plaintiff have called our attention to the case of Chicago City Railway Co. v. Tuohy, 196 Ill. 410, which is not in point for that was not the case of a suit by the administrator of the estate of a deceased child brought for the benefit of the parents and next of kin but a suit by the child itself, in which case contributory negligence on the part of the parents is in no way involved. The instruction complained of was peremptory and the error in giving it was not corrected by instructions given for the defendants, referring to the element here omitted. Chicago, Milwaukee & St. Paul Ry. Co. v. Mason, 27 Ill. App. 460.

By instruction 13, the court told the jury that if they believed that the deceased was injured in consequence of the negligence of the defendants and that her death was

caused by such injuries, and that she left her surviving heirs at law and next of kin, who had suffered pecuniary loss by reason of her death then, "you should find a verdict in favor of the plaintiff and against the defendants." The giving of this instruction was likewise erroneous for the same reasons we have referred to in connection with instruction 11.

For the errors referred to, the judgment of the Circuit Court is reversed and the cause is remanded to that court for a new trial.

REVERSED AND REMANDED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

38 - 28798

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JOSEPH LUBRAK,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 641

MR. JUSTICE THOMSON delivered the opinion of the court.

On August 30, 1919, an information was filed in the municipal court of Chicago, charging that on August 28, 1919, the defendant was an idle and dissolute person and was habitually neglectful of his employment and calling and did not lawfully provide for himself and neglected all lawful business and did habitually misspend his time without giving a good account of himself, and further alleging that the defendant was known to be a thief and burglar, having no lawful means of support, in violation of Section 270, Chapter 38 of the Revised Statutes of the State of Illinois. When the matter was reached for hearing the defendant waived a jury and the issue was submitted to the court. At the conclusion of the hearing the court found the defendant guilty of vagrancy, as charged in the complaint, and sentenced him to six months in the house of correction. To reverse that finding and judgment the defendant has perfected this appeal.

In support of the complaint, one McShane, testified that he was a police officer; that he arrested the defendant on June 7, while he was in a taxicab in company with a man named John Murphy; that he did not know the defendant but

looked him up and found that he had a record, "that is all I know"; that he investigated and found that the defendant owned a team and drove it. One McDonald testified that he was a police officer and had known the defendant for 15 or 20 years but had not seen him for the past two years. One Johnson, apparently another police officer, testified that he had known the defendant five or six months; that he "understood that he worked and afterwards he told us he didn't work"; that he saw the defendant on June 6, at Randolph street and Ogden avenue in the City of Chicago; that he "was with his brother and a lady and they were arguing and we arrested him.- We were picking up men we knew were not working." One Copeland testified that he was a police officer and had known the defendant about seven years, during which period he had seen him several times. He was asked whether the defendant was working previous to June 7, and he replied, "I don't think he was working." He further testified that he had seen the defendant in a saloon at the time when there were several other persons present whom he knew, and that these other persons were "bad men"; that there was one man in the place, who, at one time, had been arrested in connection with the robbing of a saloon and that the defendant had been in the company of this man previous to that robbery. He also testified that he had seen the defendant about August 11 in this same saloon, and he talked with the defendant and the latter told him that he was working and had straightened himself out.

In his own behalf, the defendant testified that about a month previous to the hearing he had purchased a horse and wagon which he had been using since that time in the general teaming business. That previous thereto he had been working for a Mr. Goldin driving a team, hauling coal

coal and wood and moving furniture and the like; that he had been employed by Goldin since the May previous and before that he had worked for his father, who was also in the teaming business. He maintained that he had been working all during this time, earning his living and that upon the occasions he had been seen in the saloon in question, he was not loitering about the place but had stopped in there to get a drink on his way to work or on his way home and that he did not know the other men who were in the saloon at the time.

In rebuttal, one Engle, testified that he was a police officer and that he had arrested the defendant about two o'clock in the afternoon of the "1st". What month this was is not stated. He testified that on this occasion the defendant was in a saloon at the corner of Union Park avenue and Lake street in the City of Chicago and that he was loitering about the place and that he was not able to give a good account of himself. This officer also testified that he saw the defendant in the company of two thieves on an express wagon and he proceeded to identify one Keehan, who was seated in the court room, as one of the alleged thieves. One Sullivan testified that he was a police officer and that he had arrested the defendant on June 10, at Randolph and Ogden avenue, while he and his brother were standing there arguing. He stated that there was a wagon there. On cross-examination this witness admitted that he had made an investigation and found that the defendant's representation that he was working in the employ of a Mr. "Gordon", who was in the express business, was true. Keehan was called to the stand in surrebuttal and testified that he had never been even accused of anything but disorderly conduct in his life, let alone convicted.

We are of the opinion that this evidence is not

sufficient to support a finding of vagrancy against the defendant. The whole trouble seems to be that he had a "past". After the evidence was all heard the court commented on the fact that the defendant had been convicted several times before and that on one occasion he had entered a plea of guilty; that "he has been arrested and tried for murder, from which he was acquitted, but he has been tried for burglary over and over again. He has been tried for robbery. He has been convicted several times, and yet he hangs out, according to this evidence, with thieves in a saloon which is an habitual meeting place for thieves and burglars and hold-up men." We have read the entire evidence very carefully, as it appears in the record and we are not able to find any testimony to the effect that the saloon referred to was "an habitual meeting place for thieves and burglars and hold-up men" or anything of that nature. The defendant admitted he has been bad in the past but asked "a chance to go straight". If the men, in whose company the police officers had seen the defendant, were no worse than Lechum appears to have been from the testimony, the facts would hardly seem to justify the observation that the defendant was persisting in his association with thieves and burglars and hold-up men.

It is true, as the court also observed, that in they very nature of things a charge of vagrancy is "one which cannot be proved to the satisfaction of everybody." But, the fact remains that under the law, before one may properly be found guilty of vagrancy, the evidence must be such as to convince the court beyond all reasonable doubt, that the defendant is guilty of vagrancy as charged. The mere fact that the defendant has a "past", or that he previously has been charged with the commission of some crime, or even been convicted of

crime is not enough to warrant the conviction of vagrancy.

For the reasons stated the judgment of the Municipal Court is reversed.

REVERSED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

63 - 25831

RADTMER A. KRUCHEFSKI,

Appellee,

v.

AUGUST T. KEHL,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

222 I.A. 641

MR. JUSTICE FOSTER delivered the opinion of the court.

By this appeal the defendant Kehl seeks to reverse a judgment recovered against him, for $300, by the plaintiff in a tort action of the fourth class in the Municipal Court of Chicago. The trial was had in that court without a jury.

The defendant was the proprietor of a grocery and market which he had maintained for some years in a building which he owned. Late in July 1919, the parties hereto entered into a contract wherein the defendant agreed to sell his business and stock of meats and groceries to the plaintiff for the sum of $1,100. The plaintiff paid $800 down and by the terms of the contract agreed to pay the balance of $300 within three weeks.

In his statement of claim the plaintiff alleged that on August 26, 1919, the defendant forcibly and unlawfully seized possession of the store and the stock which it then contained and unlawfully ejected the plaintiff from the premises and remained in possession of the store and converted the stock of meats and groceries to his own use, at which time the stock on hand was of the value of $1,500. The statement of claim

also alleged that the plaintiff had given the defendant a note for $500, in payment of the balance due on the purchase price of the store; that the consideration for said note had failed and that there was due the plaintiff from the defendant, $1,000. "being the value of goods of plaintiff so converted by defendant."

The plaintiff testified in support of his claim, that the defendant had, on the 26th day of August, forcibly dispossessed him and resumed possession of the store. He also testified, at great length, in support of his claim, that the stock of meats and groceries in the store at the time he was dispossessed as alleged, was worth $1,500. There is complaint by the plaintiff as to the accuracy of the abstract and we have examined all the testimony as it is set forth in the record. It is quite apparent from the testimony that the plaintiff is a man of very little experience in the management of a grocery and meat business and his testimony, with reference to the stock on hand on August 26th is very unsatisfactory both as to quantities and values.

It appears from the record that the defendant had operated that store successfully for some years. After he came into possession of the store again on August 26th, he testified that he made an inventory of all the stock in the place and that its total value was not over $300. He denied all the testimony of the plaintiff as to the forcible re-entry but stated that he had remained in the store several days after the consummation of the sale between the parties in July, helping him get acquainted with the customers and become familiar with the operation of the store and that he then left on a vacation; that after he had been away about ten days, his wife wrote him to come home, saying that the

plaintiff had asked her three or four times to send for him as he has been unable to make a success of the store and wanted to give it up; that he got home late Saturday night, about three weeks after the plaintiff had taken over the store, and that he saw the plaintiff on Sunday morning and the latter said he "could not make it go" and wanted the defendant to take the store back but that he told the plaintiff that he did not want the store again. The $500 payment was due the next day and the plaintiff made an effort to get the money at the bank but was unable to do so and at or about that time the plaintiff gave the defendant a demand note for the amount due. The plaintiff was expecting some money from New York and went to the bank a number of times in an effort to get it but it never came and it appears from the record that the plaintiff's wife got hold of his money somehow and went away with it. Finally, on August 26th the defendant testified that a boy who had been helping the plaintiff in the store, came to tell him that the plaintiff wanted to see him; that he went over to the store and saw the plaintiff and that the latter said that he had gone to the bank again to get the money but that his wife had taken all of it; that he was willing to lose $140 on the transaction but asked the defendant to pay him $500 and take back the store; that he told the plaintiff he could not pay back $500 when the plaintiff had been selling his goods for four weeks and further that if the plaintiff could not pay the balance, as agreed - he would have to sue him; that without more argument, the plaintiff handed over the keys to the premises. This was about two o'clock in the afternoon and this was the first time the defendant learned that the plaintiff was not going to make any further efforts to meet the $500 payment represented by

the note he had given. After the plaintiff had handed over the keys to the defendant, the latter went out to attend to some business, leaving the plaintiff and the boy in the store, and when he returned the plaintiff was gone. The plaintiff never paid any rent for the premises. On or about August 27, the defendant received a written demand from the plaintiff's lawyer for possession of the store and also a notice of attorney's lien in connection with any litigation that might arise over the value of the stock of groceries and meats in the store and such amounts as might be due the plaintiff. The defendant testified that he did not want to take the store back and that he told the plaintiff or his lawyer that he was perfectly willing to let him have the store, providing he made the $500 payment. The plaintiff's lawyer demanded the return of the $500 note and ultimately this note was returned to the plaintiff.

It will be seen that the accounts given by the parties to this case as to what happened on August 26 are flatly contradictory. There is considerable evidence in the record tending to strongly corroborate the defendant's version of what occurred.

One Kearns, a police officer, testified that he had traded a good many years at this store; that his station was at 91st street and the Baltimore & Ohio tracks; that he knew the plaintiff and that about the time he gave up the store in August he saw the plaintiff come into the American Railway Express office with a tub about three quarters full of lard, which he weighed. The plaintiff, while on the stand under cross-examination, alleged that the tub was empty when he weighed it. That he "sold the tub to a man, who said his scale weighed so much and I said my scale weighed so much";

that after it was weighed, he took the tub to the B. & O. restaurant. It was the defendants theory that the plaintiff was getting rid of as much of the stock as possible before he turned back the store. One Tryzska testified that he was a school teacher and had been a customer of the plaintiff while he had the store; that he was in the store to make some purchases between eight and nine o'clock on the morning of the twenty-sixth of August and that the plaintiff then told him that would be his last day; that on another occasion, about a week before, when he was in the store, the plaintiff told him that if business didn't get better, he was going to quit,- that he was dissatisfied, or words to that effect; that conversations similar to this took place three or four times during the last two weeks the plaintiff was in the store. One Claire, a salesman for Roberts & Oake, a stockyards concern, testified that he called at the plaintiff's store on Mondays and Thursdays; that the first week the plaintiff had the store he asked how things were going and he said "Pretty good,- all right"; that during the second week he said that he was dissatisfied,- that he could not make it go and he wanted Kehl to take it back. The next week the plaintiff told the witness that he could not make a living in the store at all; that he had spoken to Kehl but that the latter wouldn't take the store back. On this occasion, the witness stated, the plaintiff said that the only one who "could make that place a go would be a German or an Irishman, that it was no place for him" and he further said he was "going to sell all the goods I can out of here, get my money back and get out". This witness further testified that in endeavoring to make a sale to the plaintiff he called his attention to the deple-

tion of his stock and that the plaintiff said that he was not going to buy any more because he couldn't make it a go. This was the Monday previous to August 26. He also testified that the grocery and vegetable stock was depleted as well as the meat stock. A Mrs. Metz testified that the plaintiff came to her house to collect a bill about the time he left the store and he told her he had quit the business and when she asked him why, he replied that he couldn't make it go, and further, that he made no complaint to her about Kehl throwing him out. One Anderson testified that he was in the retail grocery and meat business in the neighborhood in which the store in question was located; that during the week previous to the time when the plaintiff quit the business, the plaintiff called him up and asked him to come over to his store, which he did, and the plaintiff then told him that he did not think he would stay in that place of business very long because it was not a paying proposition and asked the witness if he would not buy some of his stock and that he told the plaintiff he could not do so and that he further told him he was afraid to buy it; whereupon, the plaintiff suggested that they would remove the goods during the night.

In view of all this evidence we are of the opinion that the finding of the trial court was error, for the clear and manifest weight of the testimony was to the effect that the plaintiff bought this business and tried to make it go but failed, and thereupon tried to induce the defendant to take his business back and give him back his money, or all of it but $100; that the defendant declined that suggestion, whereupon, the plaintiff turned the store back to the defendant and abandoned it and ultimately induced the defendant to return his note which he had given for the balance of the pur-

chase price, and it is further clear that at that time the stock had run down until it was worth about $300.- less than the amount of the plaintiff's note which the defendant held.

The judgment in this case should have been against the plaintiff and in favor of the defendant for costs, and therefore, the judgment of the Municipal court is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the defendant did not forcibly eject the plaintiff from the premises in question and repossess himself of the store and its stock but that the plaintiff voluntarily turned the business back to the defendant as it had not proven a success and he was not able to procure money to complete the purchase. We further find as a fact that at the time the store was turned back to the defendant by the plaintiff, the stock of seats and groceries it contained was worth about $300.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

86 - 25887

ALEX CHUWANIC,

Appellee,

v.

CHEAPY MEATS AND COMPANY,
a corporation,

Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

222 I.A. 642

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment in the sum of $5,000 recovered by the plaintiff after a verdict in his favor, by a jury, fixing his damages at that amount.

The defendant corporation maintained a chain of meat markets in Chicago and one in Evanston. One Leo Ludtke was employed in the Evanston market. His home was located in Chicago. The defendant had a Ford delivery automobile, which was used in connection with its business in Evanston. Ludtke was permitted to use this car in going to and from his home. He kept the car in a garage on his premises at his own expense and in consideration for this, he was permitted to use it for his own pleasure in the evening or on Sundays. When going from his home to the Evanston market in the morning it was frequently his custom to stop at the wholesale houses or the different markets belonging to the defendant, to pick up such meats as they were short of in the market at Evanston. On the night of May 18, 1917, Leo Ludtke arrived at his home about 9 o'clock in the evening and left the car standing in front of his house. Shortly thereafter, his brother Peter

took the car, apparently with his knowledge, and while driving it along Kohey street at the intersection of Frankfurt street, he collided with the plaintiff and inflicted the injuries on which this suit is based.

The plaintiff filed his declaration on December 20, 1917, and early in January the defendant filed a plea of the general issue. Some months later the defendant filed an additional plea denying that it possessed, operated or controlled the automobile in question at the time of the accident.

In support of the appeal, the defendant contends that the verdict is against the manifest weight of the evidence in that the testimony demonstrates clearly that the plaintiff was guilty of contributory negligence and also that at the time of the occurrence in question, the automobile was not being driven by one of defendant's employees nor was it being used in connection with the defendant's business. As to the first contention it appears from the evidence of the occurrence witnesses, including the plaintiff himself, that the plaintiff was crossing the intersection of Kohey and Frankfurt streets, going along Frankfurt street from west to the east and the automobile was being driven along Kohey street from the north to the south. As the plaintiff stepped into the street from the curbstone, he looked to the north and saw the car approaching a short distance north of the intersection. He came to a stop and as he did so the automobile slowed down to some extent and the plaintiff concluded that the driver was slowing down or coming to a stop so as to permit him to cross and he proceeded to do so. The automobile was not slowed down sufficiently to permit the plaintiff to

clear its path, or the plaintiff did not hurry enough to get out of the way,- one or the other or both, with the result that the plaintiff was struck by the left hand front corner of the car. It will be seen that he had all but cleared its path when the car struck him. On the issue of contributory negligence, such a situation presents a problem for the jury to determine. They heard the descriptions of the occurrence given by the various witnesses and on this point we cannot say that their finding was against the manifest weight of the evidence.

But in our opinion, the situation is different with reference to the second part of defendant's contention.

That the automobile was owned by the defendant is not disputed. Leo Ludtke testified that when he got home on the evening in question, his brother said he was going out with the automobile to take a "spin"; that under his arrangement with the defendant he was to have personal use of the machine when he wanted it, in consideration of his maintaining a garage in which to keep the machine at night. He further testified that the nearest market belonging to the defendant was located at Aldine and Crawford avenues in the City of Chicago, which was thirty minutes ride on the street car from the scene of the accident,- "every bit of eight miles"; that his brother Peter had been up at the market in Evanston and helped him, doing little odd jobs there; that Peter did not tell him where he was going on the night in question but that he did not send him anywhere. When this car was used to take meats to the Evanston market in the morning a certain basket or meat crate was used to hold the meats, and Leo Ludtke testified that there was no such meat crate in the machine on the night in question, when he got home. Peter Ludtke testified that when his brother got

home that night he took the machine with the intention of "seeing a pal of mine who lived a few blocks away"; that he found he was not at home so he drove back and on the way the accident complained of occurred. He testified that he used his machine, on various occasions when his brother got through working; that he never went on an errand for his brother. One of the witnesses for the plaintiff, who was standing on the street corner at the time of the accident and observed what happened, testified that there was an empty meat crate or basket in the car at the time of the accident.

It will be seen that there is scarcely any evidence to support the plaintiff's theory that at the time he was injured the automobile was being used in connection with the defendant's business. Even if it be true, as was stated by one of the occurrence witnesses, that there was a meat crate or basket in the car at the time of the accident, there is nothing in the record beyond that circumstance, supporting the inference that Peter Ludtke was using the car to go to a market of the defendant and procure that crate, unless it be the further testimony of Leo Ludtke that there was no crate in the car when he reached home that evening. When that circumstantial evidence is made the basis of a verdict for plaintiff in spite of the evidence of Peter and Leo Ludtke to the direct effect that the car was not being used in connection with any errand having to do with defendant's business, but on a personal errand of Peter's, we are of the opinion that the verdict is against the manifest weight of the evidence and therefore the judgment of the Superior Court is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that at the time plaintiff received the injuries complained of, the automobile in question was not being driven by an employee of the defendant nor was it being used on any errand connected with its business.

TAYLOR, J. CONCURS.

O'[illegible], J. [illegible]:

It is the settled law that the verdict of a jury cannot rest upon imagination, speculation or conjecture. In my opinion, there is no evidence in the record tending to show that at the time plaintiff was injured, the motor truck was being used in any manner for the conduct of defendant's business and, therefore, the verdict of the jury rests upon speculation or conjecture. In these circumstances, the court should have directed a verdict for the defendant, at the close of all the evidence. Ramsey v. Adams Express Co., [illegible] Ill. 169.

98 - 25869

W. O. STEPHENS,
Appellee,

v.

NICHOLAS G. BAKAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 642

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action of forcible detainer, whereby the plaintiff sought to gain possession of a flat occupied by the defendant. From a judgment finding the plaintiff entitled to possession, the defendant has perfected this appeal. The defendant was in possession, under a written lease for one year, the lease having been executed by the plaintiff as owner of the premises. The term of this lease expired September 30, 1919. This lease was negotiated by the defendant with the plaintiff through the latter's sister. The defendant admitted that he received a notice on September 19, 1919, to terminate the tenancy on the 30th and on the latter date a written demand for possession was left at the premises by the plaintiff's agent. On the 6th of September the plaintiff's sister, Miss Stephens, called at the premises with a Mrs. Getcher and talked with the defendant's sister. Mrs. Getcher advised her that she had bought the premises and proposed to raise the rent to $35.00 a month. Miss Bakan said that she would have to talk the matter over with her brother and would let them know what they wanted to do. She testified that Mrs. Getcher gave her the name of her agent and that she did take the matter up with her brother and on the same evening called up the

agent and told him they wanted to keep the flat. There is in evidence a contract of purchase and sale covering the property, executed by the plaintiff and Mrs. Gotcher under date of September 27,1919. Neither the defendant nor his sister seem to have had any talk with either the plaintiff or his sister covering the renewal of the lease existing between the defendant and the plaintiff. At the time this case was heard the purchase and sale contract between the plaintiff and the Gotchers had not been consummated. That contract contained a clause in which Gotcher agreed to give plaintiff "the preference of leasing and occupying" the flat in question at a rental of $35.00 per month, on condition that the plaintiff "dispossess, at his own expense, the tenant who at present occupies the second flat." (The defendant).

If nothing had occurred between September 6th, the date of the conversation between Miss Stephens, Mrs. Gotcher and Miss Baken, relating to the terms of a continuation of the Baken tenancy under the Gotchers, and the end of the term, it might be that the plaintiff would not be in a position to oust this defendant after the old lease had expired. Miss Stephens had negotiated the original lease and the evidence is such as to give her such a status as would bind the plaintiff for the renewal of the lease. But, after that conversation occurred on September 6th, namely on September 19th, the defendant admits that he received a notice to terminate his tenancy at the expiration of the term, and this would put him on notice that the deal between his landlord and the Gotchers had not gone through. When this cause was heard the plaintiff still had title to the premises and no arrangement had been made with him or with his sister, by the

defendant, for a renewal of the lease. The lease had expired and in our opinion the plaintiff was entitled to possession. Therefore, the judgment of the municipal court, awarding him possession, is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

110 - 25881.

CONN EXCHANGE NATIONAL BANK, a corporation, Defendant in Error, v. WILLIAM F. BENZING, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Bank brought this action on two promissory notes, one for $760 and the other for $500, payable six months after date. Both notes were signed by the defendant Benzing and were given by him in payment of his subscription to the capital stock of the Cullen Motor Car Company, as stated by counsel for plaintiff in error in his brief. The statement of claim was to the effect that the plaintiff's claim was for $1,328.70, "being the amount due it as principal and interest, as bearer, against the defendant, as maker, of two certain promissory notes, copies of which are attached hereto and made a part hereof." Both notes were indorsed in blank by the payee, Cullen Motor Car Company and the copies attached to the statement of claim so showed. The plaintiff introduced the notes in evidence and rested. The defendant introduced no evidence although he had filed an affidavit of merits alleging that the plaintiff was not the holder of the notes as an innocent purchaser for value before maturity and that they were obtained by S. E. Cullen through false and fraudulent representations and were without consideration and had been indorsed without authority. The court thereupon directed

a verdict for the plaintiff for $1,438. Judgment was entered for that amount to reverse which the defendant has sued out this writ of error.

The sole contention of the defendant is that the plaintiff's statement of claim is fatally defective and states no cause of action in that it fails to allege that the notes were indorsed by the payee, which was essential to show title in the plaintiff and that without such title the plaintiff was without right to sue. There is no merit to the defendant's contention. Our Negotiable Instruments Act provides that an instrument indorsed in blank "is payable to bearer and may be negotiated by delivery." Illinois Statutes, (J.& A.) par. 7673. The statement of claim was to the effect that the principal and interest called for by the notes, was due the plaintiff "as bearer". That allegation necessarily implied an indorsement by the payee, in blank. Furthermore, the copies of the notes, attached to the statement of claim, showed them to be indorsed by the payee in blank. These copies were a necessary part of the statement of claim and were not to be regarded as they would be if annexed to a declaration where the cause of action is stated in the declaration itself. Flew v. Beard, 274 Ill. 232. With reference to a number of statements made in the brief of plaintiff in error, involving certain of the rules in the Municipal court, it should be said that we find none of the rules of the court in the record and this court does not take judicial notice of the rules of the Municipal court.

We are of the opinion that this writ of error must have been prosecuted for delay, and therefore, the judgment

of the Municipal court is affirmed and the plaintiff is given further judgment here for statutory damages in the sum of $143.80, being ten per cent of the amount recovered in the trial court.

AFFIRMED WITH DAMAGES.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

119 - 25890

DREXEL STORAGE & TRANSFER CO., a corporation, Appellant, v. HOTEL LA SALLE COMPANY, a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 642

MR. JUSTICE THOMAS delivered the opinion of the court.

The plaintiff, Drexel Storage & Transfer Co., brought this action against the defendant, Hotel La Salle Company, alleging by its statement of claim that its truck had been run into by a taxicab belonging to the defendant company, while the latter was being driven at a high and dangerous rate of speed on the wrong side of the street, and that said collision was due to the negligence of the driver of the taxicab. The cause was submitted to the court without a jury and after hearing the evidence the court entered a judgment for the defendant and against the plaintiff for costs, to reverse which the plaintiff has perfected this appeal.

The collision in question occurred on Indiana Ave. in the City of Chicago, in the block between 14th and 16th streets, 15th street not cutting through and intersecting Indiana avenue. St. Lukes Hospital is located on the west side of Indiana avenue between 14th and 16th streets. A grocery truck with solid panelled sides, belonging to the Tabbets & Garland Co., referred to in the testimony as the

Stop & Shop truck, was standing on the west side of Indiana avenue, in front of the hospital. It was headed south. The driver of that truck came out, got into the truck and proceeded to drive away. At this time the plaintiff's truck was coming north on the east side of Indiana avenue some distance south of the Stop & Shop truck and the defendant's taxicab was coming south on the west side of Indiana avenue, some distance north of the Stop & Shop truck. The latter truck was what is known as a right hand drive,- the chauffeur's seat being on the right hand side of the car. When the Stop & Shop truck started up, the chauffeur almost immediately made a sharp turn out into the street to the east, his intention being to turn around and proceed in a northerly direction in Indiana avenue. The taxicab swerved to the east, going over on the wrong side of the street in passing the front end of the Stop and Shop truck and the taxicab and the plaintiff's truck came together head on, the right portions of the fronts of the truck and taxicab coming into contact some distance south of the Stop & Shop truck.

One Gabriel testified that he was driving the plaintiff's truck north in Indiana avenue at a speed of about 12 miles an hour; that he was on the east side of the street and did not see the taxicab until it appeared from behind the Stop & Shop truck at which time the plaintiff's truck was about 50 feet away; that when he saw the taxicab he put on his brakes and came practically to a stop; that the street was wet and slippery and he was afraid to drive faster than he was driving; that the taxicab was going at about 30 miles an hour; that when he first saw the taxicab the Stop & Shop truck was backed out as if to turn around, with its rear end still at the curb stone. It appears from the evidence

that there was some building construction going on at this point on the east side of Indiana avenue and there was a pile of brick "on what would be the sidewalk". Gabriel testified that he ran up against the brick in an effort to avoid being struck and that he threw on the brakes when he saw the taxicab about 50 feet away and was practically at a standstill at the time of the collision; that he went about 25 feet from the time he first saw the taxicab until it collided with him; that immediately after the collision the taxicab driver told him he could have avoided hitting him by hitting the brick pile but he thought "that there would not be so much damage done if he hit me as if he hit the brick pile." On cross-examination the account of the collision, as given by the witness, was practically the same as was given on direct examination. There were a few answers given which deviated slightly from the answers given on direct examination but not materially so.

One Cantine was the chauffeur of the Otto & Shop truck. He testified that as he came out and got on his truck, he noticed the plaintiff's truck coming from the south but he did not observe any vehicle approaching from the north; that he started to turn east so as to go north in Indiana avenue and just as he started to turn he saw the taxicab "shoot by me going about 25 . . . on the left hand side of the street." He testified that the plaintiff's truck was then about 50 feet south of his truck and that "the LaSalle taxicab ran right into the Drexel Storage & Transfer truck . . . The chauffeur of the taxicab stated he either had to run into the brick pile or run into the truck . . . The taxi was running from 20 to 25 per hour; the Drexel truck was running from 5 to 10 miles per hour . . .When I started across the street I was

I was not expecting traffic. I did not hold out my hand or anything of that kind."

Alfred Born was the chauffeur of the defendant's taxicab. He testified that he was driving south on Indiana avenue about four feet west of the middle of the street, going about 12 or 14 miles an hour; that there were six or eight automobiles on the west side of the street, up against the curb in front of the hospital and that he did not see the Stop & Shop truck until "it came out from the curb, headed southeast, almost to the middle", when he was 30 feet from it. He testified further as follows: "As I saw it turn out I took my foot off the accelerator and coasted up. I turned suddenly to the east and I turned to the southeast and drove in front of him and ran up on some angle irons. . . . I was going 7 or 8 miles an hour. I did not see the truck of the Drexel Storage & Transfer Company until I passed the Stop & Shop truck. It was then 50 or 60 feet from me between the east curb and the center. When I saw the Stop & Shop truck turn east I put on my brakes. After I passed it in front I went about fifteen feet. The Drexel Storage & Transfer truck was going about 15 miles an hour. It kept on coming right straight toward me. When he got within five or six feet of me it looked as though he had put on his brakes, because there were marks in the street where he slid. The truck struck my taxicab . . . The taxicab was not moving just before it came in collision with the truck. The motor was dead." He further testified that when the Stop & Shop truck turned out he did not turn to the west because he would have hit the truck and that he did not put on his brakes because he thought the truck was going to keep on going south. He denied he had said he ran into the plaintiff's truck in order to avoid running into the

brick pile. On cross-examination he testified that he first saw the plaintiff's truck when he was going past the Stop & Shop truck and that at that time it was about 50 ft. from him; that he was about 30 feet away from the Stop & Shop truck when it started to turn and that at that time he was driving about 12 miles an hour; that he could stop his car, driving at a speed of eight miles an hour, on a wet and slippery street, "on a day such as that was" in 15 feet; that when he saw the Stop & Shop truck start to turn from the west curb, he kept going right on and turned to the east side of the street and when he started to pass around the Stop & Shop truck, he first saw the plaintiff's truck; that there was nothing to obscure his view of xxxxxxxx the plaintiff's truck before the Stop & Shop truck started to turn; that the plaintiff's truck was then about 60 feet away and the taxicab was going about 8 miles an hour and he put on his brakes and ran up on some angle irons; that his machine ran about 5 feet into the angle irons and then theplaintiff's truck ran into him; that he decreased his speed a little bit but not much, from the time he saw the Stop & Shop truck turn out up to the time he ran into the angle irons; that he was about 30 feet from the Stop & Shop truck when he shut off the power and was about 80 feet from the plaintiff's truck.

In rebuttal, the plaintiff's chauffeur, Gabriel, and the chauffeur of the Stop & Shop truck each took the stand and testified that there were no machines on the west side of the street in front of the hospital, either ahead of the Stop & Shop truck or behind it and that they did not see any angle irons in the street at the point where the collision took place.

On this record, we are of the opinion that the finding for the defendant was against the manifest weight of the evidence. The defendant's chauffeur was contradicted by both witnesses for the plaintiff in several particulars. He states that there were a number of automobiles lined up along the curb in front of the hospital and that he did not notice the Stop & Shop truck until it turned out from the curb into the roadway. Both of the other witnesses referred to, testify that there were no automobiles lined up on the west side of the street and no other vehicles in the immediate vicinity except the three involved. Both witnesses forthe plaintiff testified that after the collision the taxicab driver said that he ran into the plaintiff's truck rather than the brick pile, thinking it would result in less damage. He denies that remark. He also mentions some angle irons in the street, while the plaintiff's witnesses say they saw none. He states that he brought his taxicab to a stop about 15 feet south of the Stop & Shop truck and that the plaintiff's truck kept right on and ran into him. Plaintiff's witnesses say that the collision occurred about 50 feet south of the Stop & Shop truck and that the plaintiff's truck practically came to a stand still at about that point and the taxicab ran into it. Defendant's witness puts his speed at about 8 miles an hour in passing the Stop & Shop truck, while the other witnesses put it at about 20 miles an hour.

It may well be said that if it were not for the negligence of the chauffeur of the Stop & Shop truck, in turning out into the middle of Indiana avenue, without indicating in some way that he was going to do so, this collision would not have occurred. But, in our opinion, on the evidence of the chauffeur of the taxicab alone it is shown

that he was guilty of negligence in the operation of his taxicab, without which the accident would not have happened. With the taxicab going at the speed testified to by its chauffeur, at such a distance to the rear of the Stop & Shop truck as that witness gives, at the time the latter started to turn out, and with his statement that under the road conditions existing that day, he could at the speed of eight miles per hour stop his cab within 15 feet, it seems clear that the taxicab could have been kept on the west side of the street and behind the Stop & Shop truck or at least have been brought to a standstill in less than 45 feet, which he admits was the distance he drove between the time he saw the Stop & Shop truck turn out and the time he alleges he came to a stop. He further admits that he slowed up "a little but not much" when he swerved over onto the wrong side of the street, in going around the front of the Stop & Shop truck. He further admits that there was nothing to obstruct his view of the plaintiff's truck before the Stop & Shop truck turned out, but he testifies that, in fact, he did not see it until he got over to the east of the front end of the Stop & Shop truck. If it is true, as he contends, that he could not have kept his taxicab on the west side of the street without running into the rear of the Stop & Shop truck and it did become necessary for him to swerve over onto the wrong side of the street, ordinary prudence on his part would call for bringing his taxicab to a stop as quickly as possible so as to avoid colliding with any vehicle that might be approaching from the opposite direction on the right side of the street, especially where the chauffeur had not been watching for the approach of vehicles from the opposite direction, as must have been true in this case where the plaintiff's truck was coming without anything to obstruct the view of the taxicab driver and had come to

within a point of 100 feet, and yet he had not seen it. It is quite apparent from this evidence that when the Stop & Shop truck turned out, the defendant's chauffeur, as he himself says, merely removed the pressure of his foot from the accelerator and "coasted up" with the intention of passing around in front of the truck at practically the speed at which he had been traveling, although he knew that this was taking him over on the wrong side of the street where there was danger of colliding with vehcilles approaching from the opposite direction, and although he had been paying so little attention to the traffic that he had not observed the plaintiff's truck, which he admits was less than 100 feet away. That, in our opinion, is such negligence as to make the defendant liable, notwithstanding the fact that the chauffeur of the Stop & Shop truck may also have been guilty of some negligence, which in part contributed to this collision.

The plaintiff introduced competent evidence in proof of his damages. One McFadden testified that he was connected with the Reo Motor Car Company and that a truck belonging to the plaintiff was brought into their shop for repair. It was objected that this truck had not been identified as to the one involved in the collision. The objection was properly overruled. The collision occurred on September 21st, and the truck was brought into the repair shop on the 23rd. The damages to the truck described by the witness, were such as would be expected in the case of a head on collision, where the right hand portions of the fronts of the two vehicles came together as the witnesses testified was the case here. McFadden testified to the work which had been done in repairing the truck and to the

fair market value of the new parts provided. In giving a list of the various new parts and the work done in making of repairs, the witness used a memorandum, which was the original job sheet in his own hand writing. Its use by the witness was objected to on the ground that there was no showing of any independent recollection and it was contended that it was improper to permit the witness to use the memorandum, unless he could state that after refreshing his memory by its means he had an independent recollection of the facts involved. This is not the rule. Such a memorandum may be used by a witness to refresh what is known as his past recollection, although he may not have at any time while on the stand as a witness, any present recollection of the facts recorded. If the witness states that the memorandum in question was made by him at a time when the facts recorded were freshly in his mind and that they were accurately and correctly recorded, and at the time he made the record he knew the facts in question to be true and correct, although he now has no independent recollection of the facts, the memorandum may be used to refresh his past recollection and he may read from it, or a better practice is to introduce the memorandum itself in evidence. Lach v. Pearson, Ill. App. Ct. First District, No. 25345, not yet reported. The objection raised by counsel forthe defendant, to the use of the memorandum, is not tenable and was properly overruled. In our opinion also, the witness last referred to made proper proof of the fact that in repairing the damages to the truck there were 117 hours of labor required and that the fair and reasonable price of labor of that kind at that time was $1.25 per hour. By this testimony, the plaintiff submitted proper proof to the effect that his damages amounted to $347.74.

For the reasons stated, we hold that the finding and judgment of the trial court were against the manifest weight of the evidence and therefore the judgment is reversed and since the trial was without a jury, judgment for the plaintiff, for the sum of $347.74, is entered in this court.

JUDGMENT REVERSED AND JUDGMENT HERE.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

245 - 28017

JACQUELINE SCHEY, Administratrix of the Estate of OTTO SCHEY, Deceased,

Appellee,

v.

CHICAGO CITY RAILWAY COMPANY,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

222 I.A. 643

MR. JUSTICE THOMAS delivered the opinion of the court.

By this appeal the defendant Chicago City Railway Company seeks to reverse a judgment for $2,500 recovered in the Circuit Court of Cook County by the plaintiff administratrix. The latter brought this action under the Injuries Act, to recover damages resulting from the death of her husband, alleged to have been caused by the negligence of the servants of the defendant in so managing one of their cars as to bring it into collision with a truck which was being driven by the deceased, knocking him from the truck to the street and thus inflicting the injuries which it is claimed caused his death a short time thereafter.

The accident in question occurred on Clark street in the City of Chicago. This is a north and south street on which the defendant operated a double track street railway. Twelfth street intersects Clark street at right angles and some distance north of that intersection. Taylor street also intersects Clark street at right angles. There was an elevated viaduct at Twelfth street where it crosses Clark street and there was an incline

leading up to this viaduct, beginning some distance south of Taylor street. This inclined approach to the viaduct extended (in width) to the east side of Clark street but did not extend more than a few feet west of the southbound track of the defendant railway. The west driveway on Clark street extended on the level, alongside the inclined approach to the viaduct and under the latter. This west driveway was used by northbound as well as southbound traffic, where it was desired to avoid going up over the viaduct, there being no place to drive under the viaduct on the east side of Clark street.

On the west side of Clark street and south of Taylor street, there was a railroad freight depot, which stood back from the street line a distance described by the witnesses as being from 30 to 50 feet. The open space in front of the freight depot was paved with cobblestones, as was Clark street, and there was nothing between the street and this freight yard except the trolley poles belonging to the defendant company.

On the day in question, the deceased was driving a two horse truck, north in the west roadway of Clark street. He had passed under the Twelfth street viaduct and was proceeding north toward Taylor street. There were eight or ten trucks backed up to the freight depot and several teams or trucks were proceeding south in the west driveway of Clark street and south of Taylor street. A southbound street car was also moving along the west track of the defendant company. When the deceased reached a point a short distance north of the foot of the incline above referred to, he turned his team in a northeasterly direction and proceeded at that angle across the street car tracks. His horses were going

at a fast walk or slow trot and according to some witnesses he appeared to be hurrying them. Before he had cleared the path of the southbound car, the wagon was struck at the rear part of the left hand rear wheel and was swung around to the east. The deceased fell to the street, striking his head, receiving the injuries alleged to have caused his death.

There was considerable conflict in the testimony as to whether the injuries he received on the occasion in question constituted the proximate cause of his death or whether it was due to other causes not connected with that occurrence. In support of the appeal, the defendant contends that the verdict and judgment recovered by the plaintiff are against the manifest weight of the evidence, inasmuch as it is shown that the injuries complained of were not caused by any negligence on the part of the defendant but were rather brought about, or at least contributed to, in some part, by the negligence of the deceased himself, in which latter case, the plaintiff would be precluded from a recovery even though negligence on the part of the defendant were also shown.

It is the defendant's contention that as this collision did not occur at a street intersection but in the middle of the block, it may invoke the superior right of way doctrine, as laid down by our Supreme Court in the case of Fiesta v. Chicago City Ry. Co., 284 Ill. 246. But it must be apparent that the situation in the case at bar is not at all such as was involved in the case cited or in any other case involving an accident "in the middle of the block," where the doctrine referred to, has been applied. There was testimony to the effect that trucks proceeding from the freight depot south, were customarily driven up to Taylor street on the west side

of Clark street and across the latter street at Taylor street, but we do not find testimony supporting the defendant's contention that it was the established custom for trucks, coming north under the viaduct, to proceed along the west side of Clark street until they reaches Taylor street before crossing to the east side. The motorman did testify that this was the first time he had ever seen a northbound truck cross over, south of Taylor street. Even if the situation at the place of collision and the circumstances then presented, were such that it could be said that the street car had a right of passage, along its track, which was superior to that of the truck, it would not follow as a matter of law, that in driving across the track as he did, the deceased was guilty of contributory negligence. If the distance between the point of crossing and the car and the apparent speed of the car and that of the truck were such as to induce in the mind of an ordinarily prudent person a belief that he had ample time to drive over to the east side of the street at that point with safety, then it would not be negligence on his part to do so. All these elements were the subject of testimony which was more or less conflicting as were also the various elements going to the question of whether the motorman was negligent and therefore these issues were properly submitted to the jury. From all the testimony, it could not be said as a matter of law, either that the motorman was free from negligence or that the deceased was guilty of contributory negligence nor can we say that the verdict on these issues is against the manifest weight of the evidence.

We shall refer briefly to the various instructions to which the defendant has called our attention. The defendant requested and the court refused an instruction reading as follows:

"The jury are instructed that the law does not exact or require of a street car company that its servants should be all the while upon their guard against dangers not reasonably to be expected, or against unusual or extraordinary occurrences or conduct on the part of others, nor does it require such companies to conduct their business with a degree of caution that would permit (prevent) the practical operation of their roads."

That instruction, as an abstract proposition of law, is correct, but in our opinion it was properly refused, simply because it was an abstract proposition, presenting only one side of an issue that was sharply contested and was therefore so argumentative as to be likely to mislead the jury and cause them to believe, that, in the judgment of the court, the crossing of the tracks, under the circumstances disclosed by the evidence did present a danger not reasonably to be expected and that to operate the defendant's car in a manner other than it was shown to have been operated on the occasion in question, would be to require it to conduct its business with a degree of caution that would prevent the practical operation of its road.

By an instruction requested by the plaintiff and given by the court, the jury were told that a preponderance of the evidence, "may not be entirely determined by the number of witnesses testifying," and that in determining upon which side the preponderance of the evidence is, the jury should take into consideration certain elements, naming them but failing to include the element of the number of witnesses testifying on one side and on the other. An instruction somewhat similar to this was criticised by the Supreme Court in S.J.& S. Ry. Co. v. Lawler, 229 Ill. 481. But an instruction more nearly like the one involved in the case at bar was approved in West Chicago R. R. Co. v. Liebscrowitz, 197 Ill. 607. By telling

the jury that in determining the preponderance of the evidence, they should not be guided "entirely" by the number of witnesses testifying, the court clearly intimates that that is an element to be considered and then proceeds to set forth the others that the jury should take into consideration. Any other meaning of the instruction appears to us to be forced and unreasonable.

The court gave an instruction submitted by the defendant, to the effect that if they believed that the injury to the deceased was the result of a mere accident, which occurred without the negligence of the defendant, as charged in the declaration, they should return a verdict for the defendant. But before giving it the court added a paragraph as follows:

> "By the term accident is meant a happening or an event for which no legal responsibility attaches. An injury occasioned or caused without negligence or where no legal responsibility attaches may be termed an accident, but if it was caused by the negligence of some other person, it is not an accident as used in cases of this kind."

This paragraph should not have been given. It was confusing to say the least, but we do not regard it as reversible error.

The court gave an instruction reading as follows:

> "It is true that the street car has a superior right in a street where its track is laid and over which its cars run, and while it is the duty of persons driving wagons on said street not to unnecessarily interfere with said operation and running of said cars, yet this does not mean that the driver of a wagon has no right to drive across a street car track, if he does so exercising reasonable or ordinary care to avoid injury to himself and others and if he does so exercising reasonable or ordinary care to avoid obstructing or delaying or interfering with the operation of said cars. The bare fact, if such is a bare fact that a driver does drive his wagon across a street car track and is struck by a street car, is not as a matter of law an act of contributory negligence on the part of said driver, but the question of whether such driver was in the exercise

of ordinary care as explained in this and other of these instructions, is a question of fact for you as jurors to determine after fully and fairly considering all the evidence in the case."

It is urged that this instruction is similar to the first instruction to which we have referred, which was submitted by the defendant and which the court refused. If so, this instruction also should have been refused. But in our opinion, the instructions are not alike. The latter instruction does state an abstract proposition of law but it proceeds to apply the proposition stated, to the facts shown by the evidence and tells the jury that the issue presented by these facts is for them to determine in the light of the law as stated.

The defendant submitted an instruction on the question of the rate of speed, in which the jury were told that if they believed that under all the circumstances the speed at which the car was being run was consistent with the exercise of ordinary care, then no negligence could be attributed to the defendant in the operation of the car on the ground of the speed at which it was running. The court gave this instruction after adding at the end of it the words "on that count". One count of the declaration specifically charged excessive speed and another charged negligence generally, in the operation of the car. The words referred to should not have been added to the instruction but it should have been given as submitted. But in our opinion the error was harmless for we do not feel it could have confused the jury or affected the verdict.

In the last instruction complained of, a long and involved instruction, covering two printed pages of the abstract of the record, which was given by the court on its

own action, the jury were told, among other things, that the plaintiff must prove, by a preponderance of the evidence, that the deceased was injured by the negligence of the defendant, as charged in the declaration and that he died in consequence of these injuries, and the instruction then proceeded in part as follows:

> "and now upon the question of the proximate cause of the alleged injury and upon the question of the proximate cause of the death of the deceased the court instructs you as follows:
>
> The meaning of the term proximate cause of an injury if an injury has been received, is defined as the direct or immediate thing that causes or brings about or produces the alleged injury. It is also defined as the essential cause of an injury where an injury has been received.
>
> The proximate cause of an injury does not necessarily have to be the sole cause of an injury, if an injury has been received. If there are two or more causes of an injury, if each of said causes is an essential cause and if each contributed in a material degree to bring about such injury, if any, and if the combined effect or the combined operation of all such causes operating and acting together, produced or brought about such injury, and if without the one of such things or causes, the injury would not have happened, then and in such case, if such is the case, either of such causes would be deemed a proximate cause."

It is argued that the part of this instruction relating to the proximate cause of the alleged injury suffered by the deceased, was necessarily very misleading, inasmuch as the only controversy between the parties as to the proximate cause of the injuries received by the deceased at the time of the collision, was as to whether the proximate cause was the negligence of the defendant or the contributory negligence of the deceased. But there was another element in this case. It was contended by the defendant that at thatime of the occurrence in question, the deceased had been drinking and that after the car had struck the wagon and swung it around and both vehicles had come to

a step, the deceased toppled over from his seat, forward, and fell into the street, down between his two horses. From this it was contended that the real cause of the fall of the deceased was not the collision but the liquor which the deceased had consumed. The part of the instruction complained of was doubtless prompted by that issue. In view of that element which was urged by the defendant we are of the opinion that an instruction on proximate cause was proper and that the instruction, especially when considered with all the other given instructions, was not improper and the giving of it cannot be considered as error.

For the reasons we have stated, the judgment of the Circuit Court is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

348 - 26113

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel ANNA LAVONNI,

Defendant in Error,

v.

DICK KRISSNOWITZ,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

222 I.A. 343

MR. JUSTICE THOMAS delivered the opinion of the court.

The People of the State of Illinois, on the relation of Anna Lavonni, brought this proceeding against the defendant, Dick Krissnowitz, alleging him to be the father of her bastard child. When the cause was reached for trial the defendant made a motion asking that he "be informed as to the particular Bastardy Act he was charged with violating." The court then stated that the proceeding had been brought under the Act in force July 1, 1919. Counsel for defendant in his brief states that he interposed an objection to this, which was overruled.

Upon being arraigned, the defendant stood mute, whereupon the court ordered that a plea of not guilty be entered. A jury was duly waived by the defendant.

The relatrix testified that she had known the defendant for two years; that she had had sexual intercourse with him during the year 1918 and up to within five months of the birth of her child and that the child was born on July 4, 1919. She also testified that she had never had sexual intercourse

with any man except the defendant.

The defendant did not introduce any testimony. The court found that the defendant was the father of the bastard child of the relatrix, "which child was born on the 14th day of July, 1919." The court further ordered that the defendant pay the sum of $1,100 to the Clerk of the Court for the support, maintenance and education of the said child, said sum to be payable in accordance with the provisions of the statute.

We deem it immaterial that the court misstated the date of the birth of the child, in the finding, making it the 14th day of July instead of the 4th day of July. The material point was that the child was born after the 1st day of July, 1919, on which day the Bastard Act under which these proceedings were had, went into effect.

The main contention of the defendant in support of this appeal is that the cause of action in a bastardy case arises at the time a woman becomes pregnant and inasmuch as it is evident that the relatrix in the case at bar became pregnant in the fall of 1918, these proceedings could not have been had under the act which became effective July 1, 1919, but should have been brought under the provisions of the act which was in force in the fall of 1918.

We have recently had occasion to consider this precise question in <u>The People of the State of Illinois, ex rel Marie Hansen</u> v. <u>Anton Ciemeniecki</u>, case No. 26045 in this court, opinion filed June 16, 1921, not yet reported. In that case it was held, in effect, that in bastardy proceedings, the law in force at the time of the birth of the child is the one under

which the proceedings should be had. We shall not repeat here the reasons which are fully set forth in the opinion referred to.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

LEVINSON.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

12 - 25286

CHARLES B. ENSIGN, Doing Business as C. B. ENSIGN AND COMPANY,
Plaintiff in Error,

vs.

SANITARY FEATHER CO., a Corporation, and J. S. POOLEY,
Defendants in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

222 I.A. 643

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

A judgment was entered in the Municipal court of Chicago in favor of the defendants which the plaintiff by writ of error seeks to reverse. Suit was brought on the instrument following:

> "Chicago, Ill., June 5th, 1913. For the insertion of my 1/5th page advertisement in the Rothschild & Company's Chicago Elevated Railway Transportation Directory, we agree to pay the Chicago Elevated Railway Transportation Directory, or order, the sum of One Hundred Dollars ($100.00) on or before October 1, 1913.
> Sanitary Feather Co.,
> By J. S. Pooley.
> Address: 422 So. Canal St.
> Endorsement: Chicago Elevated Railway Transportation Company Directory by L. F. Kenney, Proprietor.
> L. F. Kenney."

The question to be determined is whether this instrument is to be regarded as a negotiable promissory note, or whether it constitutes merely a contract between the parties for advertising. The evidence does not show that Chicago Elevated Railway Transportation Company Directory is a corporation. The instrument bears upon its back an endorsement which purports to be an endorsement by Chicago Elevated Railway Transportation Company Directory by L. F. Kenney, Proprietor.

Business Directory

The evidence shows that Kenney on June 5, 1913, called upon J. S. Pooley, a defendant below, who was at the time cashier and bookkeeper for defendant Sanitary Feather Company, and solicited from him a 1/5th page advertisement in what is called in the instrument Rothschild & Company's Chicago Elevated Railway Transportation Directory, and which was exhibited to Pooley as the "Chicago Elevated Railway Directory." Pooley testified that Kenney represented himself to be from Rothschild & Company; that the order for the advertising was to be confirmed by that company and that after the written order had been given Kenney said: "You will hear from Rothschild & Company shortly." The name of the defendant Sanitary Feather Company was signed to the instrument by a rubber stamp by (as shown by the abstract of record) "J. Hooley." Pooley, however, identified the signature to the paper as his. The president and treasurer of the Sanitary Feather Company testified that he knew nothing about the execution of the instrument, but that persons other than the president and secretary had signed contracts for the company.

The plaintiff testified that he was a dealer in commercial paper and that Kenney did business as Chicago Elevated Railway Transportation Directory; that he, plaintiff, had had prior transactions with him, and that June 6, 1913, the day after the execution of the instrument, he had purchased it from him.

We are inclined to the opinion that the instrument in question cannot be regarded as a negotiable promissory note, and, whatever the actual intent might have been at the time of its execution, that it is so drawn as to be well calculated to deceive. Kenney assumed to transact business under a fictitious and misleading title. The promise to pay $100 was given to Chicago Elevated

Railway Transportation Directory for a 1/5th page advertisement in that the instrument described as Rothschild & Company's Elevated Railway Transportation Directory. The promise to pay was made to a person having no legal or actual existence, and it was given for the insertion of an advertisement in a publication. On its face the writing recites that the defendant Company promised to pay for a 1/5th page advertisement in Rothschild & Company Chicago Elevated Transportation Directory. We think it a proper construction of the instrument to hold that the promise to pay was not absolute, but that it depended upon the insertion of the advertisement, as agreed in the instrument.

Our attention is called to the case of Siegel Cooper & Co. v. Chicago Trust & Savings Bank, 131 Ill. 569, where the Supreme court said:

> "But the question remains, whether the statement or the recital of the consideration on the face of the instrument impairs its negotiability, and, in this instance amounts to a condition precedent. The mere fact that the consideration for which the note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears, through the recital, that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid."

It is quite true that the mere recital of the consideration on the face of an instrument which contains a promise to pay a certain sum of money absolutely within a definite time, would not, in and of itself, necessarily impair the negotiability of such an instrument. The instrument before us, however, contains an express promise to pay money for the doing of a particular thing, that is, the insertion of the advertisement, and we are inclined to hold that the agreement to insert the advertisement does qualify the promise to pay and to render it conditional. Stated otherwise, the instrument when correctly interpreted states

Railway Passenger Association Directory for a 1/8th page advertisement in that the instrument involved is properly a promissory note. Railway Passenger Association Directory. The promise of payment made to a person having neither legal or moral obligation, and it was given for the insertion of an advertisement in a publication. On the face the writing recites that the defendant Company promised to pay for a 1/8th page advertisement in Railway & Company Passenger Travel Directory. It took it a matter construction of the instrument to hold that the promise to pay was not absolute, but that it depended upon the insertion of the advertisement, as agreed in the instrument.

Our attention is called to the case of Giant Powder & Co. v. Chicago Union & Savings Bank, 121 Ill. 609, where the Supreme Court said:

> "As to the written promise, neither the validity or the legality of the consideration on the face of the instrument impeaches its negotiability, and, in this instance reference to a condition precedent. The mere fact that the consideration for which the note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears, through the recital, that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid."

It is quite true that the mere recital of the consideration on the face of an instrument which contains a promise to pay a certain sum of money absolutely within a definite time, would not, in and of itself, necessarily impair the negotiability of such an instrument. The instrument before us, however, contains an express promise to pay money for the doing of a particular thing, that is, the insertion of the advertisement, and we are inclined to hold that the agreement to insert the advertisement does qualify the promise to pay and to render it conditional. Stated somewhat, the instrument does strongly indicated that

a promise to pay conditioned upon the performance of the agreement to insert the advertisement.

In the Siegel Cooper & Company case, supra, the promise to pay money was given for a privilege of inserting an advertisement in framed advertising signs in street cars. The consideration for the promise to pay made in that case was for a privilege only and there was nothing in the instrument there sued on to put a holder thereof, in due course, on notice. Here the instrument on its face contains an agreement for the insertion of an advertisement in a publication. It was not for a mere privilege or a right to use the publication for a definite purpose or time. In the one case the promise to pay was given for a privilege which the promisor had the right to exercise or not, as he pleased; in the other, the promise was made upon the agreement of the promisee to do the thing agreed to in the instrument. The promise to pay in the instant case by the one party was conditioned upon a promise to perform a service by the other.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

324 - 28006

[illegible]

vs.

FRANK PECZINKITIS,

[illegible]

APPEAL FROM CIRCUIT COURT OF

COOK COUNTY.

222 I.A. 643

MR. PRESIDING JUSTICE DUFFY

DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit court of Cook county entered in that court in favor of plaintiff for the sum of $89.45 on the trial of an appeal from a judgment of a justice of the peace of Oak Park, Illinois.

No pleadings were filed in the case and it is necessary, so far as it is possible to do so, to determine the issues presented to the trial court from the evidence introduced. From an examination of the abstract of the record we gather that on October 13, 1918, defendant, Peczinkitis, brought an attachment suit against plaintiff before a justice of the peace. A personal judgment was rendered in that suit against appellee for the sum of $55 and costs. Although the record does not disclose that a judgment, either conditional or final, was rendered against a garnishee served with summons in this suit, it does appear that the garnishee on the 28th day of December, 1918, paid to the justice of the peace the sum of $39.05. Nothing further appears in the record in connection with this suit. A short time after the entry of the judgment last referred to, plaintiff's wife brought suit against the defendant before a justice of the peace and obtained a judgment against him for $190. An appeal was taken from this judgment to the Circuit court of Cook county and upon a retrial a judgment was entered in favor of the plain-

tiff in that action for $110. The claim of plaintiff in that suit was for wages and the judgment rendered in her favor was satisfied. While this latter case was pending in the Circuit court appellee began the present suit before a justice of the peace. No appearance has been filed here on behalf of appellee, and from a careful examination of the record we are unable to determine upon what claim of right the suit was brought. The judgment entered is for $69.45, and if we assume that the suit was brought to recover the sum of $39.05 paid into court by the garnishee in the first action and also the sum of $30 for attorney's fees, then the judgment must be reversed. Even if it be conceded that the garnishee voluntarily paid money due the plaintiff into court in the attachment suit, plaintiff's right of action would lie against it and not against the defendant in this action.

From the record before us it is impossible to say what issues were presented to the trial court, and it is our opinion that the evidence does not disclose that defendant was indebted to the plaintiff at the time the suit was brought.

The judgment of the Circuit court will therefore be reversed and judgment of nil capiat entered here.

REVERSED AND JUDGMENT HERE.

McSurely and Matchett, JJ., concur.

349 - 26121

NATIONAL UNION ASSURANCE SOCIETY, a Corporation, Complainant, vs. MABEL B. STONE et al., Defendants, vs. ANNA ELIZABETH COE, WILLIAM T. STONE, MINNIE GRILL, ADA A. BRATTAIN, JENNIE MICHEL, LEILA PEARL FORREST, Appellants, vs. MABEL B. STONE, Appellee.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

222 I.A. 643

MR. PRESIDING JUSTICE DEVER

DELIVERED THE OPINION OF THE COURT.

A bill of interpleader was filed in the Superior court of Cook county against Anna Elizabeth Coe, William T. Stone, Minnie Grill, Ada A. Brattain, Jennie Michel and Leila Pearl Forrest, children of John A. Stone, deceased, and Mabel B. Stone, his widow. A decree was entered in the cause in favor of Mabel B. Stone. The children of deceased seek to reverse this decree by appeal to this court.

As stated in the brief of counsel for appellants, the sole question in dispute in the case is whether Mabel B. Stone, appellee, had a living lawful husband at the time of her alleged marriage to deceased, and therefore whether she was at the time legally competent to enter into a valid marriage with deceased. Evidence introduced on the trial tends to show that a benefit certificate issued by complainant for the sum of $2,000 on the life of deceased was made payable to Mabel B. Stone, his wife.

Mabel B. Stone married deceased on January 29, 1916, and lived with him as his wife from the time of the marriage until his death January 7, 1917. The controversy in the case centers about the claim that appellee at the time of her intermarriage with deceased was the lawful wife of Jeffrey L. Wood, with whom it is said she had established a common law marriage relationship in the State of Michigan for some years following the years 1899 and 1900.

On an examination of the evidence we are convinced that the decree of the Superior court is not erroneous. Certain witnesses introduced on behalf of appellants testified that they had heard that appellee had lived with Wood in Birmingham, Michigan for a period of time beginning in the year 1899 or 1900. One witness testified that he knew both Wood and appellee and that he supposed that they were married. The testimony of these witnesses did not in our opinion establish a common law marriage relationship between Wood and appellee; it is somewhat vague and its purport in general is that the witnesses knew Wood and appellee and that they, or some of them, thought they were married. There is merit in the point made that the answer of appellants does not sufficiently allege that a common law marriage existed between Wood and appellee and that she was ineligible to enter into a valid marriage contract with Stone. But aside from this question the evidence introduced on behalf of appellants does not sufficiently establish such relationship. Appellee definitely denied that she was the common law wife of Wood; and assuming, as we do, that a common law marriage relationship, during the period in which it is said Wood and appellee cohabited and lived together, could legally be created in the State of Michigan, the evidence contained in the record before us is amply sufficient to support the conclusion of the chancellor that appellee was legally competent to

Robert L. Stone married deceased on January 29, 1926, and lived with him as his wife from the time of the marriage until his death January 1, 1917. The contestants in the case contend that the claim that appellee is the widow of Robert L. Stone, who died on the 1st day of January, 1917, is not legally tenable, with the result that if it is held to be such a marriage under the laws of Michigan for some reason it is void.

On an examination of the evidence we are convinced that the decree of the Superior court is not erroneous. Certain witnesses introduced on behalf of appellees testified that they had heard that appellee had lived with and as husband, cohabitated for a period of time beginning in the year 1880 or 1890. One witness testified that he knew that and appellee and that he supposed that they were married. The testimony of those witnesses did not in our opinion establish a common law marriage relationship between Stone and appellee; it is somewhat vague and its purport in general is that the witnesses knew that and appellee and that they, or some of them, thought they were married. There is merit in the point that the record of quasi-marriage does not establish a common law marriage.

Upon the evidence introduced on behalf of appellants does not appear that the parties entered into a mutual agreement to be husband and wife, nor that they ever lived together as such. Indeed, the evidence denied that she was the common law wife of Stone; and, on the other hand, we do, that a common law marriage was knowingly, during the period in which it is said Stone and appellee cohabited and lived together, could legally be created in the state of Michigan, the evidence received in the record before us is wholly insufficient to support the conclusion of the chancellor that appellee was legally the wife of Robert L. Stone.

enter into a marriage contract with deceased at the time she became his wife by legal ceremony in the state of Illinois.

The decree of the Superior court is therefore affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

384 - 36498

222 I. 644

JAMES A. MURLEY,
Appellee,

vs.

ANDERS E. ANDERSON,
Appellant.

222 I.A. 644

MAY TERM, 1916.

HELD IN THE SUPREME COURT.

The plaintiff, James A. Murley, brought an assumpsit suit in the Circuit court of Cook county against defendant, Anders E. Anderson. A judgment was entered in favor of the plaintiff for the sum of $3007.40, which the defendant seeks to reverse by appeal to this court.

The declaration filed in the cause consisted of the common counts and two special counts, in the first of which it is alleged in substance that on June 5, 1916, plaintiff and his mother, Sophia Murley, resided upon a farm in Edgar county, Illinois, which was the property of said Sophia Murley; that the stock, tools, implements and equipment on the farm were the property of Sophia Murley and plaintiff; that on said date they entered into a written contract with defendant. This contract was set out in haec verba in the declaration.

The contract provided for the exchange of a twenty-seven apartment building owned by defendant in Chicago, subject to an incumbrance of $64,000, for the farm, which consisted of about 329 acres and which was free of incumbrance.

The main controversy between the parties arises out of the language used in two separate paragraphs of the contract. One paragraph provides that:

"Subject to an incumbrance amounting to Sixty-four Thousand Dollars ($64,000.00). It is understood that the first party (defendant) is to pay to the said second party One Thousand ($1,000.00) on or before the first of January, 1917, and Fifteen Hundred Dollars ($1,500.00) on or before the first day of August, 1917, and reservation is hereby given that the said Twenty-five Hundred Dollars ($2500.00) can be paid to the said second party at any time after this deal has been closed up to August 1st, 1917."

Following the part of the contract above quoted there appears in the contract a description of the farm to be conveyed and then appears the following language:

"It is further agreed and understood that for the sum of $2500.00 which will be paid upon the closing of this deal, to James A. Marley, one of the second parties hereto, full possession will be given to the said party of the first part to all of the stock, tools, implements, and his interest in all of the crop and hay now located upon the said above described (farm)."

At the close of all the evidence introduced upon the trial both on behalf of the defendant, who, though in court, did not testify, and of the plaintiff, the court on motion of the plaintiff instructed the jury to return a verdict in his favor, and a similar instruction tendered on behalf of the defendant was refused, as also certain other instructions which the court refused to give on his behalf.

Evidence introduced on the trial tended to prove that the stock of farming implements and equipment on the farm was owned for the greater part by the plaintiff, who, under a renting agreement with his mother, operated the farm. The defendant owned a large flat building in Chicago and through the efforts of a real estate agent the written contract was entered into for the exchange of this building for the farm.

The paragraph last above quoted, if disconnected from the rest of the contract, would seem to express a promise made by the defendant to pay James A. Marley the sum of $2,500 for his, Marley's, interest in the stock, tools, implements and the crops and hay located on the farm. It is urged, however, that this

paragraph, when read in connection with the whole contract, shows that the parties thereto agreed that defendant was to pay $2500 to the plaintiff or his mother for their entire interest in both the farm and its equipment and stock. The paragraph of the contract first quoted above shows that the defendant had promised to pay a total sum of $2500; $1000 to be paid on or before January, 1917, and $1500 on or before August 1, 1917. This payment was, however, to be made by Anderson, as shown by the contract, as a payment, in addition to the transfer of the Chicago property, for the interest of plaintiff's mother, Sophia Marley, in the farm lands. Nothing is said in this part of the contract about the stock, tools, equipment or crops. When the entire contract is read as one instrument it appears that the parties thereto intended to enter into mutual and distinct agreements for the transfer of the land, as to which part of the contract Sophia Marley became a necessary party, and also for the transfer of the crops, tools, implements, equipment, etc., concerning which James A. Marley, being in the main the owner thereof, was necessarily concerned.

The contract is on its face somewhat ambiguous as to just what interest Sophia Marley and James A. Marley had in the separate subject matters thereof, hence the court properly admitted testimony which tended to explain away these ambiguities. This oral testimony shows that James A. Marley owned nearly all of the personal property which was conveyed to the defendant as a result of the contract, and his uncontradicted testimony shows that a schedule of this property showing its kind, quantity and value was drawn up, typewritten, and accepted by Marley.

The transaction for the exchange of the property was

consummated at Paris, Illinois, and the evidence is satisfactory and uncontradicted that at this time the defendant said that he would mail plaintiff a check for $2500 as soon as he, defendant, would return to Chicago.

Notwithstanding the fact that testimony was introduced which tended to prove that the defendant repeatedly thereafter agreed to pay plaintiff the $2500, he, though in court, did not contradict this testimony.

We are inclined to agree with the contention made for plaintiff that when the contract is read as a whole it becomes apparent that it contains two separate and distinct covenants which are several and not joint and which cover, and were intended to cover, the several interests of Sophia Hurley and James . Hurley in the farm land and the personal property mentioned in the contract.

It does not appear that the plaintiff had any interest in the subject matters of the contract other than the personal property referred to, and as the evidence tends to show that the deal would not have been consummated for the exchange of the farm without plaintiff's promise to sell his interest in the personal property, his interest appears to be a several one in that property, and he therefore was authorized by law to maintain his suit against the defendant. Plaintiff's cause of action against defendant was several, hence the suit must be so. The cases cited on behalf of plaintiff amply sustain his position on this question. Hull v. Leigh, 8 Cranch. (12 U. S.) 50; Ramsluth v. F. M. Association, 122 N. Y. 130; Carthrae v. Brown, 3 Leigh. 100; James v. Emery, 5 Price. 529; Coleman v. Sherwin, 1 Salk. 137; Van Antwerp v. Van Slyck, 18 Barb. 327.

In Combs v. Steele, 50 Ill. 161, a suit against one of several obligees on a contract, the Supreme court said:

> "Contracts will be construed to be joint or several, as the case may be, where the intent of the respective parties appears on the face of such obligations, and that construction will be adopted which is most consistent with the words employed to express the undertaking of the several parties."

There is no denial in the record of the evidence which shows that defendant repeatedly promised to pay the amount claimed by plaintiff, $2550, during some months following the execution of the deed; and there is force in the argument that the parties themselves placed a construction upon the contract identical with that urged here by the plaintiff.

A prima facie case was made out on the trial by the plaintiff and the defendant wholly failed to meet this case. The trial court was therefore justified in instructing the jury, as it did, to find the issues for the plaintiff, and as a consequence no error was committed by the trial Judge in refusing instructions tendered by the defendant. Polish Catholic Union v. Marczak, 182 Ill. 27.

It is urged that the trial court erred in refusing to strike certain depositions from the files on the alleged ground that the depositions could not be taken upon oral interrogatories when a dedimus was issued for the taking thereof. The dedimus was issued to "Miss Lucy E. Bishop, Notary Public, as commissioner." The depositions appear to have been taken under authority of Chapter 51, section 22 of the Evidence Act. Upon the taking of depositions each party is authorized by section 30 to appear before the commissioner in person, or by attorney, and interrogate the witness. In the instant case the defendant was represented before the commissioner by an attorney.

In the case of Gardner v. Meeker, 169 Ill. 46, it is said:

> "What is meant by the term 'non-resident witness,' as found in the second line of section 28? A non-resident is one who does not reside in or is not a resident of a particular place. One may be a non-resident of the United States, or of a state, or of a county, or of any particular place. It is contended by plaintiff in error that the term, as used here, refers to one not residing in the state. It may as well refer to one not residing in the county, and there is as much reason for giving the right to oral examination where the witness resides in the state as where he resides beyond."

The very evident meaning of the language used in section 28, as we read it, is that depositions of non-residents may be taken in any cause pending in this state upon oral interrogatories and that the commissioner to be appointed to take such deposition is to be appointed in the same manner as provided in section 26 of the Evidence Act. The point made is that the depositions in question should have been taken on written interrogatories. The affidavit for the taking of the depositions states that the witnesses were not residents of Cook County and that they resided more than one hundred miles from Chicago. It is our opinion, therefore, that the record shows that the witnesses were non-residents and that their testimony was properly taken on oral interrogatories under section 28 of the Evidence Act.

It is also argued that the verdict was not returned by the jury impaneled to try the case, and it is insisted that the paper verdict, which has been specially certified to this court and is not included in the bill of exceptions, shows that the jurors impaneled to try the case were not the same as those who returned the verdict. This question was not raised in the trial court, nor was the paper verdict included in the bill of exceptions. We are therefore without power to disturb the judgment for this reason.

In the case of Fidelity & Casualty Co. v. Gehne, 94 Ill. App. 117, the court said:

> "In order for the proper verdict to be looked at by us it should have been preserved by bill of exceptions. It is here only in the common law part of the record, made by the clerk, where it has no place."

In Goldstein v. Smith, 65 Ill. App. 683, the Supreme court said:

> "No objection was made to the verdict when it was received upon the ground that it was returned by eleven only. When the verdict was returned counsel permitted it to be received without any question as to the persons who returned it. Had there been any error in this respect, it might have been corrected had objection been made. Now was the question raised upon motion for a new trial.
>
> "We cannot consider it when raised for the first time in this court."

Goldstein v. Reynolds, 86 Ill. App. 36[illegible].

It is argued that reversible error was committed by the trial court in ruling upon the admissibility of evidence. As intimated above, it is our opinion that the contract was in some degree ambiguous and much of the evidence introduced on the trial was for the purpose of explaining the language used in the contract. This evidence was not admitted for the purpose of contradicting or varying the terms of the contract; rather, its purpose was to make definite what is indefinite in the contract. In any event, even though it was error to admit certain of this evidence, the error could have worked no injury to the defendant if it can be said that the contract upon its face, when correctly construed, shows that the defendant was indebted to the plaintiff on a several promise to pay for the personal property owned by the plaintiff.

In view of what has been said it will not be necessary to consider a motion made on behalf of plaintiff to vacate an order of this court heretofore entered denying a motion to strike the bill of exceptions from the record.

The judgment of the Circuit court is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

361 - 26535

MARY DOWLING,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY
and CHICAGO RAILWAYS COMPANY,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

222 I.A. 344

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained a judgment against the defendant in the Superior court of Cook County for the sum of $1,500.00. Defendant seeks to reverse this judgment by appeal to this court.

The declaration filed in the cause charged that the defendant while in possession of and operating a street car in 47th street at or near its intersection with Princeton avenue in Chicago, negligently and carelessly permitted the car to move and start while plaintiff was alighting therefrom. Evidence introduced on behalf of plaintiff tends to show that she boarded the car in question at Wentworth avenue and rode therein in a westerly direction on 47th street to Princeton avenue, a distance of about four blocks, at which place the car stopped for the purpose of letting off and taking on passengers; that while plaintiff was in the act of alighting from the car and before she had time, in the exercise of due care, to safely alight therefrom, the car was suddenly moved causing plaintiff to fall therefrom to the ground and injuring her.

The evidence introduced on behalf of defendant tends to prove that plaintiff stepped from the car while it was in motion and just before it came to a stop at Princeton avenue. The plaintiff testified that the car had come to a full stop; that a passenger was in the act of getting off the platform while she, plaintiff, was attempting to leave the car; that in so doing she, plaintiff, grasped

the upright bar which extended from the middle of the platform of the car to the roof, and that as she was about to place her right foot on the ground the car started.

It is urged for defendants that the only negligence charged in the declaration is that after the car had reached Princeton avenue and while it was at a standstill and while plaintiff was alighting from it, it was started, as a result of which plaintiff was injured; that the evidence introduced on the trial does not tend to sustain this allegation, and that, hence, the judgment of the trial court should be reversed.

It is true, as asserted, that there is some contradiction in the testimony of witnesses who testified for plaintiff as to the place where the car stopped. These witnesses, however, seem to agree that the car had come to a full stop before plaintiff had attempted to alight therefrom. We do not think it can be held on the record before us that even if it be conceded that plaintiff attempted to leave the car while it was in motion she would be barred of recovery for the reason, as urged, that her declaration is grounded on the negligent moving of a stationary car while she was alighting from it. An additional count of the declaration charges that plaintiff was injured by reason of the negligent operation of the car. It is assumed, however, in the brief of counsel for plaintiff that plaintiff's alleged injuries were caused by the negligent starting of the car after it had come to a full stop.

The evidence discloses a direct contradiction among the witnesses who claim to have seen the accident. There is nothing, however, improbable about the testimony of the plaintiff. It is shown that the car did stop apparently for the purpose of taking on and letting off passengers, and while the witnesses do not agree as to the precise place where the car stopped and as to the exact

point at which plaintiff fell from the car or where she was found lying in the street after the accident, the jury, who had an opportunity to see and hear the witnesses, was in a much better position to determine these disputed questions of fact than are we.

At the time of the accident plaintiff was accompanied by her husband, who was carrying packages and permitted his wife to leave the car in front of him. His testimony is somewhat uncertain as to where the car stopped and as to just where plaintiff fell from the car. Apparently he remained on the rear platform of the car after the accident until it had moved a short distance, when he got off and went back to where plaintiff was lying in the street.

Mrs. MacMillan, a witness who was standing on the sidewalk near the scene of the accident, testified that she was not able to say just where the front end of the car was when plaintiff fell; that the car had stopped at the usual stopping place at Princeton avenue.

Plaintiff's case rests upon her theory that the car had come to a full stop and was suddenly started while she was attempting to alight therefrom. This theory is supported by the testimony of plaintiff and that of other witnesses, and although it is contradicted in a material way by evidence offered for the defendant, we cannot hold that the jury should have found that the evidence introduced on the trial failed to support the declaration. We do not think it can be said that the testimony offered by plaintiff and her witnesses is so highly improbable as to warrant a reversal of the judgment.

The conductor of the car in question testified that the plaintiff attempted to alight from the car while it was in motion, and that she got off backwards and fell upon her back. If

the jury believed this testimony it could have found the issues for the defendants. It was, however, within the province of the jury to disregard this testimony if for any reason based upon the evidence they believed it untrue, and to find in accordance with the evidence submitted on behalf of the plaintiff, even though it was apparent that plaintiff's witnesses were not in accord upon all the circumstances attending the accident. Halbey v. Hayes, 267 Ill. 521; C. & J. H. Ry. Co. v. Wanic, 230 Ill. 530.

No claim is made that the judgment of the trial court is excessive or that the court erred in the admission of evidence or in its instructions to the jury.

The judgment of the Superior court will be affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

436 - 26612

EARLE A. RUSSELL doing business as the BUILDERS MILL COMPANY,
Appellee,

vs.

GRAND TRUNK WESTERN RAILWAY COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 644

MR. PRESIDING JUSTICE DRUCK DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in favor of the plaintiff for the sum of $342.00 entered in the Municipal court of Chicago.

In a filed statement of claim it was alleged that the defendant, a common carrier, negligently failed to deliver at Detroit, Michigan, sixty-nine window frames of the value of $342.00 shipped by the plaintiff at Chicago.

It is admitted by defendant that the shipment was unreasonably delayed, but it is urged that plaintiff is not entitled to recover the damages awarded by the trial court. It is argued that defendant is not liable for the enhanced value of the frames, which the evidence shows were constructed for a special purpose, and also that even though the evidence discloses that the shipment had been unreasonably delayed, this fact did not authorize the plaintiff to refuse to accept the shipment when tendered to him by the defendant.

The evidence introduced on the trial shows that the window frames were manufactured and shipped to Detroit to be placed in a building in the course of construction in that city, and that because of delay the consignee named in the bill of lading had cancelled the contract for their purchase.

It is contended that the defendant carrier had no

notice or knowledge of the special character of the shipment, nor that it was intended for a special use, nor that the contract between the consignor and the consignee required delivery of the shipment within any particular time, and that having no such knowledge or notice, it would not be liable for damages of a special nature arising out of the fact that the shipment was intended for such particular purpose. Produce Reporter Co. v. Adams Express Co., 176 Ill. App. 74.

However, evidence shown by the record, but not by the abstract of record, discloses that the plaintiff relies upon proof of the market value of the shipment at Detroit. He testified that the market value of the frames at Chicago in April, 1917, was $375.00, and that they were worth more in the Detroit market than at Chicago.

As to the point made that the freight charges on the shipment should be deducted from the market value of the goods, it may be answered that the plaintiff testified that the contract price of the goods at Detroit was the sum of $342.00, the amount of the judgment, plus the freight charges to Detroit. There is nothing in the record tending to show what the freight charges actually were, and, hence, even if the evidence authorized us to do so, we would be unable to deduct the charges from the amount of the judgment.

It is said that plaintiff refused to accept the frames after they were returned to Chicago. The evidence on this point is, to say the least, somewhat doubtful. It appears by correspondence between the parties that the plaintiff offered to accept the frames and allow defendant a credit of $20.00 on plaintiff's claim for their reasonable market value. Plaintiff also offered to take back the

frames if defendant would pay the claim for damages and he, plaintiff, would sell them and remit the amount received therefor to defendant. It appears that the parties were unable or unwilling to come to any agreement as to plaintiff's claim for damages or as to what disposition should be made of the shipment, and the defendant sold the frames for the sum of $19.00. There is evidence in the record to the effect that the plaintiff after the shipment had been delivered to the defendant informed its agent that his, plaintiff's, customer would not receive the frames unless they were delivered at a certain time. Notwithstanding this notice the frames were not delivered at the time specified therein, and it is said for the plaintiff that in that this evidence shows that the frames were intended for a special purpose, the judgment in his favor should for that reason be sustained. However this may be, it is our opinion, as intimated above, that the findings and judgment of the trial court find support in the evidence on the theory that the judgment represents the difference between the fair cash value of the frames in Detroit at the time they should have been delivered to plaintiff's customer and their value at and after the time the consignee refused to accept them.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

McBurely and Hatchett, JJ., concur.

452 - 26626

MINNIE E. SKELLY,
Appellant,

vs.

RAYMOND P. OLESEN, Ad-
ministrator, etc.,
Appellee.

Appeal from Superior Court
of Cook County.

222 I.A. 644

MR. PRESIDING JUSTICE DYER
DELIVERED THE OPINION OF THE COURT.

Minnie E. Skelly filed a bill in equity in the Superior court of Cook County against Raymond P. Olesen, administrator of the estate of Peter . Olesen, deceased, in which she sought to charge the South Side State Bank as trustee, in her favor, of a deposit of money in the bank in the name of Peter . Olesen, deceased.

The charge in the bill in brief is that deceased, Peter . Olesen, had during his lifetime made a gift of the money to complainant. The evidence introduced on the trial shows that complainant was a widow; that deceased, Peter . Olesen, became a boarder at her residence in 1916 and remained there until his death in 1918; that deceased left him surviving two sons, defendant Raymond P. Olesen and Reginald Olesen.

One Vella Cook testified that she had visited complainant two or three times a week during the time that deceased boarded with complainant and that he always gave complainant his pay check to deposit in the bank; that on one occasion complainant had offered to return the pass book, which was in the name of deceased, to him and that he had refused to accept it; that she had heard him say that the money belonged to complainant and that he wished her to have it; that in response thereto the complain-

ant had answered, "Well, I don't want it; I want you to be independent," and that in reply deceased had said, "Well, all right, if you feel that way." The testimony of this witness, as that of another witness called for complainant, a Mr. Inman, is far from establishing a trust of the fund in the bank in favor of the complainant. Inman's testimony is to the effect that deceased would ask complainant to deposit his wages in the bank and that so far as he, the witness, knew deceased had given his pay checks to her. This witness testified also that on such occasions deceased would ask complainant how the account was getting along.

It is conceded that the account in the bank was kept in the name of deceased. His son, Raymond P. Olesen, testified that after deceased's death he asked complainant about the bank book and that she said she knew nothing about it; that she knew there was a bank account and that "he always carried the book with him."

The defendant bank filed a cross-bill in the nature of a bill of interpleader and a decree was entered in the cause in favor of defendants. The court ordered dismissal of the bill of complaint and it found that at the time of his death Peter W. Olesen had on deposit with South Side State Bank the sum of $800, and it ordered the bank to pay this sum with interest thereon to Raymond P. Olesen, administrator. Complainant brings the case here by appeal.

For the complainant it is insisted that a savings bank deposit may be made subject to a valid lien by the mere delivery of a pass book and that a court of equity will enforce a trust so created where the evidence shows such was the intention of a donor.

Assuming for the purpose of the present case that the equitable rules relied upon by complainant are correctly stated, it is our opinion that it cannot be held that the trial court erred in concluding that the complainant had failed to establish a trust in her favor, as charged in the bill of complaint.

The undisputed evidence is that the money in question was earned by and was the property of deceased, Peter A. Olesen, and that it was deposited in the bank in his name. There is some evidence of an admission on the part of the complainant that the deceased always kept the bank book in his possession. The evidence tends to prove, not only that the money was earned by the deceased and deposited in his name, but that he kept control of it, as also the bank book, during his life time. It is true, as urged, that one witness testified to certain statements made by deceased in the witness' presence which tended to show that he intended to give this money to the complainant, but the testimony of this witness quite as clearly establishes the fact that the complainant in response to a suggestion of deceased that he desired complainant to have the money, said, "Well, I don't want it. I want you to be independent," and that deceased had replied, "Well, all right, if you feel that way." The testimony of this witness, Vella Cook, was much weakened by cross-examination. She was unable to state whether deceased was employed during the day or the night. She stated that she thought he had a night job in 1919, although deceased died in October, 1918. She stated that the first conversation she had heard between complainant and deceased occurred in February or March, 1917, and that on this occasion deceased expressed surprise when told that complainant had deposited his wages in the bank in his name. An examination of the bank book, however, discloses that the first deposit was made in October, 1916; that

two withdrawals were subsequently made, one of $10.00 and one of $29.00, and following these a deposit of $23.00 was made on February 10, 1917. In the absence of evidence it is a fair presumption that these withdrawals were made by the deceased, as on the record before us he was the only person who had the right to withdraw money from the account.

The witness, Inman, who testified for complainant stated that deceased "simply produced his pay check and asked her to deposit this check ~~xxx~~ asked her how the account was getting along, that is all;" and that complainant answered him by saying, "Getting along very well, that is all."

In the case of Millard v. Millard, 201 Ill. 85, the Supreme court said:

> "A verbal gift without a delivery transfers no title, and unless the donor divests himself of all dominion over the subject-matter of the gift the title will not pass. If he retains the custody and control over it the gift will not be completed. The only witness who testified to what was claimed as an actual gift was Jane H. Millard and her testimony did not prove a valid gift, since it showed that she did not obtain exclusive control over the subject-matter of the alleged gift and that there was no delivery as the law requires." 20 Cyc. 1205.

It is our opinion that the evidence fails to establish a gift inter vivos of the bank deposit, or that a trust was thereby established of the fund in favor of the complainant. So far as the evidence shows the money deposited was at all times under the control and dominion of the deceased and the bank was at no time prior to his death informed of the alleged trust in favor of the complainant. The evidence introduced in support of the bill of complaint does not measure up to the requirements of the law that a trust sought to be imposed upon a bank deposit, as in the present case, must be established by clear, unequivocal and certain evidence.

The decree of the Superior court is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

92 - 25863

MEYER SHURE,
Appellee,

vs.

ANTON J. CERMAK,
Appellant.

APPEAL FROM COUNTY COURT OF
COOK COUNTY.

222 I.A. 645

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a judgment on a verdict for $400 in an action of trespass. The facts as stated by appellant are that on August 20, 1917, the North American Brewing Company recovered a judgment against Meyer Shure, the present plaintiff, for $487.75; execution was issued thereon and given to Anton J. Cermak, bailiff of the Municipal court, who by his deputy levied on some saloon fixtures in Shure's previous place of business. These fixtures were mortgaged to the Brewing Company, and on September 20th were sold for $14.25. October 4th the bailiff levied on the saloon business of Shure and placed a custodian in charge. Subsequently Shure and his lawyers sought to have the Brewing Company release its levy on the ground that the property levied upon belonged to Shure's brother, Louis Shure. The Brewing Company refused. October 11th Meyer Shure filed a schedule, claiming that as a married man he was entitled to certain exemptions, including liquors, miscellaneous articles, and an automobile. Thereupon schedule appraisers were appointed and the various articles scheduled, except the automobile, were appraised at $942. The automobile was retained by Shure and the other articles were sold for $300 and the money turned over to the Brewing Company on account of its judgment.

The statute requires that after property claimed to be exempt has been appraised the debtor shall select from such

This is an interlocutory appeal from a judgment on a verdict for $600 in an action of trespass. The facts as stated by appellant are that on August 26, 1927, the North American Bowling Company recovered a judgment against Dave Jones. The present plaintiff, for $487.70; execution was issued thereon and given to Union S. Cornwell, Sheriff of the Municipal court, who by his deputy levied on some saloon fixtures in Jones's previous place of business. These fixtures were mortgaged to the Bowling Company, and on September 29th were sold for $16.25. October 4th the Sheriff levied on the saloon furniture of Jones and placed a custodian in charge. Immediately Jones and his lawyer should be sure the Bowling Company release its levy on the second lot. The property levied upon belonged to Jones's brother, Louis Jones. The Bowling Company refused. Further life insurance policies of a substitute, claiming that a mortgage on a new insured in certain exceptions. Suddenly Jones disappeared, leaving his automobile. Thereupon plaintiff brought suit against the Bowling Company on account of its judgment.

The charge requires that after reasonable diligence is to assume has been exercised the Sheriff should levy the same

schedule the articles he desires to retain. Illinois Statute, (Hurd, chapter 52, sec. 14.) The record shows that Shure made no such selection. Under such circumstances it was the duty of the bailiff to proceed with the sale. Finlen v. Howard, 126 Ill., 259.

If the retaining by the judgment debtor of the automobile be considered the selection, then the bailiff was in the proper exercise of his duty in selling the balance of the property to satisfy the execution. Failure to do this would render him liable to the plaintiff in the execution for any loss thereby sustained. Mills v. Larrance, 217 Ill. 446.

Another reason why the judgment cannot stand is that it is against Anton J. Cermak individually, while the record shows that he was acting through his deputy in his official capacity as bailiff of the Municipal court.

For the reasons above given the judgment is reversed, and as there can be no proper judgment against defendant individually, judgment of nil capiat will be entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT.

Dever, P. J., and Matchett, J., concur.

349 - 25014

EDWIN P. TILLE,
Appellee,

vs.

THOMAS W. BURTON,
Appellant.

[illegible]
[illegible] COURT.

222 I.A. 645

MR. JUSTICE Mc CURDY DELIVERED THE OPINION OF THE COURT.

Defendant, Thomas W. Burton, seeks by this appeal the reversal of a judgment of $745.00 entered against him upon the verdict of the jury.

The abstract and brief of defendant do not give the title of the case properly as required by section 69 of the Practice act, and the writer of the brief has, in its preparation, ignored the rules of this court. Also the abstract fails to give, in the proper place, the judgment of the trial court. The observance of what is required in these particulars would greatly assist the reviewing court.

As the case must be remanded on account of errors upon the trial, we shall only briefly state the facts. Defendant, Burton, was married to the daughter of plaintiff, who before her marriage had taken out a life insurance policy for $1,000 for the benefit of her father, the plaintiff, although plaintiff apparently did not know that he was the beneficiary. The testimony tends to show that soon after her marriage Mrs. Burton desired to change the beneficiary, making the policy payable to her husband in the event of her death, and signed one of the forms of the insurance company to effect this change. Thomas Burton had possession of the policy and of the paper purporting to change the beneficiary. Some twelve or fifteen months afterwards Mrs. Burton died, and subsequently Thomas Burton, upon applying at the office of the Insurance company

for the amount of the policy, was informed that the change of beneficiary could not become effective without the consent of the father, and it was suggested that the check for the amount of the policy would be made out in the name of the father, who could indorse it to the defendant. The evidence tends to show that both plaintiff and defendant met for the purpose of having this done, and defendant retained an amount equivalent to the expenses incurred during the last illness of Mrs. Burton and the funeral expenses, and gave plaintiff a check for the balance, amounting to $450, which defendant claims was a complete settlement of the entire matter. Defendant also says that no demand or request was ever made by plaintiff for any further sum for nearly three years thereafter, although they were frequently together and their relations were entirely friendly. Plaintiff says that Burton retained a portion of the proceeds of the policy contrary to the wishes of plaintiff and against his protest, and that he repeatedly and constantly thereafter demanded that Burton pay him the entire amount.

There is a sharp conflict in the testimony of the respective witnesses and the result must be determined largely by their credibility. Under such circumstances it was very important that the jury be accurately instructed and in such a way as not to mislead.

Defendant properly complains of an instruction given at the instance of plaintiff as follows:

> "The court instructs the jury that under the facts and issues in this case the defendant admits that he received a check in the sum of $978.23, payable to the order of the plaintiff, and that out of the proceeds of said check he retained the sum of $528.23. As a defense to this suit, it is claimed by defendant that he retained said sum by virtue of an agreement and understanding between him, the defendant, and the plaintiff, that he might do so. And before this defense can prevail, defendant must establish it by a preponderance of greater weight of the evidence, and unless the jury find that the evidence in support of said agreement preponderates in favor of the defendant, the

jury will find the issues for the plaintiff."

This instruction is open to the criticism that it misstates the defense in that defendant asserts it was the intention of Mrs. Burton that he should receive the full amount of the policy in the event of her death and had taken what they thought to be the necessary steps to this end; that plaintiff did not claim any part of the proceeds and in indorsing the check was merely giving effect to his daughter's wishes, and that the amount paid by defendant to the plaintiff was a gratuity. Defendant was entitled to present this view to the jury, but this is negatived by the statement in the instruction that the defendant retained part of the money by virtue of an agreement with plaintiff. The instruction is also objectionable in directing a verdict for plaintiff unless defendant establishes his defense by the greater weight of the evidence. This is contrary to the rule; although it may be incumbent under certain circumstances for a defendant to make proof of certain matters of defense, the burden is always upon the plaintiff to prove his claim by the greater weight of the evidence. The instruction is also subject to the criticism that it makes the defendant's lack of proof supply the preponderance of evidence which the law requires of the plaintiff. Kamers v. Illg, 49 Ill. App. 615. As was said in Merritt v. Dewey, 218 Ill. 589, criticising a similar instruction, "Upon the whole case, the burden of proof was upon the plaintiff to show such a state of facts as would authorize him to recover."

The second instruction given at the request of plaintiff is also objectionable in that it told the jury that if plaintiff delivered the check to defendant for the purpose of having it cashed, etc., it was not alleged in the declaration nor supported by any evidence that plaintiff delivered the check to defendant

for this purpose. The charge was that defendant wrongfully retained possession of the check and induced the plaintiff to indorse the same. Predicated upon this erroneous assumption, the jury were peremptorily instructed to find the issues for plaintiff. This was reversible error.

The fifth instruction given at the request of plaintiff is also objectionable in that it tells the jury that the check was the property of plaintiff, which was a disputed fact. It also in effect tells the jury that the mere retention of part of the fund represented by the check amounts to an unreasonable and vexatious delay. This ignores the claim of defendant that the check and its proceeds rightfully belong to him and mere delay is not necessarily unreasonable and vexatious. The debtor must have thrown obstacles in the way of collection, or by some means induced the creditors to prolong the time of proceeding against him longer than he would otherwise have done. County of Franklin v. Layman et al., 145 Ill., 159.

We see no sufficient reason for refusing the instruction requested by defendant, which is the old stock instruction that the plaintiff is required by law to establish his case by a preponderance of the evidence. Such an instruction has been approved times without number and its refusal was erroneous. Schroeder v. Dolah, 1[illegible] Ill., 4[illegible].

Complaint is made of the admission of testimony in regard to another policy referred to as the "Baby Policy." Plaintiff says that this matter was first touched upon by defendant's counsel and that plaintiff merely followed it up on recross-examination. This testimony was clearly irrelevant whichever side first brought it out.

The question to the witness Lilly Mesalick, daughter of

plaintiff, with reference to her presence in the court room on the occasion of previous trials of this case was proper as showing - if it was the fact - that she had not testified before. Objection to this question was erroneously sustained.

We find no authority for the claim of the defendant that interest cannot be allowed for unreasonable and vexatious delay unless this is alleged in the declaration.

This case has been tried three times. On the first trial the jury were unable to agree upon a verdict. The second trial resulted in a verdict for the defendant, which was set aside by the trial court. In the third trial the verdict was favorable to the plaintiff. This shows the closeness of the case upon the facts and emphasizes the necessity of a trial free from error.

For the reasons above indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Dever, P. J., and Hatchett, J., concur.

363 - 26035

FREDERICK H. MEYER,
Appellee,

vs.

GEORGE LAWRENCE,
Appellant.

IN THE MUNICIPAL COURT
OF CHICAGO.

222 I.A. 645

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for plaintiff in a forcible detainer suit tried by the court.

The case turns upon whether or not plaintiff, Frederick H. Meyer, could give an effective notice to defendant of the termination of a month to month tenancy. This depends upon the facts, which are that in May, 1914, Wilhelmina Guenther, owner of the premises in question, leased them to defendant for a term ending April 30, 1919. When this term was ended the parties by a written memorandum dated May 1, 1919, made an agreement granting to defendant the right to continue in the premises "as a tenant from month to month at a rental of $150 a month." Defendant continued to occupy under this agreement. July 10th following, Richard E. Wernecke was appointed conservator of the estate of Wilhelmina Guenther, who had been adjudged an incompetent person. July 17th Wernecke as conservator made a lease of the premises to plaintiff, Frederick H. Meyer, for a term of years beginning August 1, 1919, and ending April 30, 1930. Wernecke, who collected the rents, testified that after the lease to Meyer was made he told the defendant that Meyer had rented the place, and was requested by defendant to ask Meyer how soon he wanted possession of the premises, and after talking with plaintiff, Wernecke told defendant that he could remain for a few months longer and that plaintiff would give him a thirty day notice when he wished to terminate the month to month tenancy. Wernecke further testified that he told defendant he was now renting from Mr. Meyer, and defendant thereafter paid $150 a month, which

Fernecke turned over to plaintiff. October 1, 1919, there was served upon defendant a notice requesting possession of the premises on November 30, which notice was signed by Fred H. Meyer, Landlord.

The position of defendant is that under section 6 of the Landlord and Tenant statute, chapter 80, the only person who may terminate a tenancy by the month by giving thirty days notice in writing is the landlord, who in this case was Wilhelmina Guenther and not plaintiff, Meyer. Counsel for plaintiff does not meet this claim by citing cases supporting the rule that the lessee ordinarily is the proper party to bring an action in forcible detainer where possession of the premises is wrongfully withhbld. Defendant says, very properly, that he was in possession by virtue of his lease by the month, which must be terminated in the manner prescribed by the statute before he can be said to wrongfully withhold possession.

We are of the opinion that defendant is not in a position to question the right of plaintiff, Meyer, to terminate the tenancy by the month by giving the thirty day notice, for the reason the evidence shows that defendant attorned to plaintiff as his landlord. It is true that defendant testified contradicting the witness, Fernecke, with reference to anything having been said as to plaintiff's connection with the premises, and denied that he ever had any knowledge of the lease to Meyer. This was a question of fact which the trial court, who heard and saw the witnesses, resolved favorably to plaintiff, and we see no sufficient reason to disagree. Upon proof of the fact that defendant attorned to plaintiff as his landlord, it follows under well established rules that defendant cannot question his right to terminate the month to month tenancy, and that the notice to

this end must be held to have been effective.

The tenancy having been terminated, the continued possession by defendant was wrongful, and there is no controversy as to the proposition that plaintiff could thereafter rightfully maintain his action in forcible detainer.

Upon the record the judgment is right and is affirmed.

AFFIRMED.

Dever, P. J., and Hatchett, J., concur.

293 - 26065

JAMES S. DEMING, Administrator of the Estate of ADELINE PURDY THURSTON, Deceased,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAY COMPANY, CALUMET & SOUTH CHICAGO RAILWAY COMPANY and THE SOUTHERN STREET RAILWAY COMPANY, Operating Under the Name and Style of CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

222 I.A. 645

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

On the afternoon of July 8, 1917, Adeline Purdy Thurston, an elderly person, was riding in the rear seat of an automobile driven by her son, Dr. Fredus A. Thurston, going north on Bishop street in Chicago. As it was crossing the street car tracks on Sixty-third street it was struck by an eastbound streetcar of defendants and Mrs. Thurston received injuries which it is alleged caused her death. Suit was brought by the administrator of her estate and upon trial a judgment for $2400 was had, from which defendants have appealed.

The declaration alleged that the intestate, while riding, was in the exercise of ordinary care for her own safety, and that defendants negligently drove, managed and operated the street car and at an excessive rate of speed and without warning ran violently against the automobile, causing the injuries.

Defendants argue at great length that the verdict is against the manifest weight of the evidence. The accident happened in the afternoon of a clear day. Dr. Thurston, who was driving the automobile, was an experienced driver. The automobile was a seven passenger touring car, and upon this occasion the top was up but the side curtains were not on. Allowing for

all discrepancies in the various stories of the witnesses and the contradictions between them, the jury properly could believe that the automobile was going north at about fifteen miles an hour; that as it came near Sixty-third street Dr. Thurston saw a streetcar headed east approaching the west side of the intersection of Bishop street; that he slowed his automobile, intending to stop, and at the same time noticed that the street car had slowed up as if to stop; that this was apparently an indication for him to proceed across the tracks, but just as he was near the eastbound track the streetcar suddenly started up, increasing its speed, and struck the rear wheel of the automobile, swinging it around so that when the vehicles stopped the automobile was lying alongside of the north side of the street car. There was also evidence tending to show that the bell on the street car was not rung, which was another circumstance leading the driver of the automobile to believe that the motorman of the street car intended to give the automobile the right-of-way across Sixty-third street. Based upon these circumstances, we see no sufficient reason to disagree with the conclusion of the jury that the accident was caused through the negligent operation of the street car as charged in the declaration.

Before there can be a recovery it must be alleged and proven that plaintiff's intestate was at the time in the exercise of ordinary care for her own safety. Hooper v. Adams Express Co., 289 Ill. 169. She was seated in the rear seat on the lefthand side. Although she was eighty-seven years old, her eyesight, hearing, mental faculties and health were good. There is no evidence that she warned her son, for he saw the approaching streetcar and was apparently using his best judgment as to how he should direct the movements of his automobile. It is difficult to say just what the intestate should have done in the exercise

of ordinary care for her own safety different from what she did do. It can hardly be claimed that she, an aged woman and a guest, should have interfered with her son, a man forty-seven years of age and an experienced driver. Her conduct as constituting contributory negligence was properly submitted to the jury and the conclusion that she was in the exercise of ordinary care is fully justified.

Should the court have sustained the motion of defendants for a directed favorable verdict on the ground that recovery is barred by the contributory negligence of the driver of the automobile, Dr. Fredus Thurston, a son of the intestate and one of the beneficiaries in this action? While it is doubtful whether a jury would have found upon the record that the driver of the automobile was guilty of contributory negligence, yet they were instructed that even if they found that he was, this would not relieve defendants from liability. Defendants' motion was based upon the holdings in Chicago City Ry Co. v. Wilcox, 138 Ill. 370; City of Pekin v. McMahon, 154 Ill. 141; C. & A. R. R. Co. v. Hogue, 158 Ill. 621; Ohnesorge v. Chicago City Ry. Co., 259 Ill. 424. These were cases where an infant was killed and the decisive factor seems to have been that the child was in the custody or control of the parent, whose negligent conduct contributed to the accident. We find no decision in this or in any other state applying this rule to the case of an injured adult with good sight, hearing and mental faculties. Reading the opinion in the Ohnesorge case leads us to believe that the exception in the case of an infant was followed under the rule of stare decisis. The court seemingly recognizes the force of the contention that there should be no exception to the rule of liability under the statute of 1853, (chap. 70) even in the case of the death of an infant, by saying:

of ordinary care for her own safety different from what she did do? It can hardly be claimed that she, an aged woman and a guest, should have interfered with her son, a man forty-seven years of age and an experienced driver. Her conduct as constituting contributory negligence was properly submitted to the jury and the conclusion that she was in the exercise of ordinary care is fully justified.

Should the court have sustained the motion of defendants for a directed favorable verdict on the ground that recovery is barred by the contributory negligence of the driver of the automobile, Mr. Theodore Thurston, a son of the intestate and one of the beneficiaries in this action? While it is doubtful whether a jury could have found upon the record that the driver of the automobile was guilty of contributory negligence, and the case is- [illegible] from the holdings in Chicago City Ry. Co. v. Wilcox, 138 Ill. 370; City of Pekin v. McMahon, 154 Ill. 141; C. & A. R. R. Co. v. Logue, 158 Ill. 621; [illegible] v. Chicago City Ry. Co., 280 Ill. 424. These were cases where an infant was killed and the decisive factor seems to have been that the child was in the custody or control of the parent, whose negligent conduct contributed to the accident. We find no decision in this or in any other state applying this rule to the case of an injured adult with good sight, hearing and mental faculties. Reading the opinion in the Wilcox case leads us to believe that the exception in the case of an infant was followed under the rule of stare decisis. The court seemingly [illegible]

> "If this question were an open one in this court appellants' argument would be entitled to serious consideration, but this court has ever regarded the rule of stare decisis, and under that rule we are required to adhere to our previous decisions."

No sufficient reason appears for avoiding liability imposed by the statute where an adult is killed. A distinction between the case of an infant and an adult may be that an infant in control of the parent is incapable of negligent conduct, while the adult may be barred from recovery by his own negligence and not by the negligence of a third party.

The jury could properly find that the intestate's death was caused by the accident. While she was very old, she was apparently in good health just before the accident. The streetcar weighed about twenty-three tons and struck the automobile just opposite the place where she was sitting, forcing her against the side of the automobile. A hole was made in her face about two inches deep, passing through the mallar bone into her cheek; she also suffered a fracture of the pelvic bone. After the accident she was removed in an ambulance to a hospital, where she subsequently became unconscious and died that evening. She was apparently in pain up to the time of unconsciousness. This was sufficient to justify the conclusion that the accident was the proximate cause of her death.

Complaint is made of some of the rulings of the trial court upon questions and testimony, but we find no error of vital importance, if any, in this regard.

In view of what we have said above, it was not error to refuse to instruct the jury that contributory negligence of intestate's son in driving the car would bar a recovery, and plaintiff's given instruction upon this point was proper.

We see no sufficient reason to disagree with the verdict, and as no reversible errors occurred upon the trial the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

e No. 1864a] 26 0 6 5

3M 2-18-21

[illegible]

Error to the Municipal Court of Chicago;
Superior Court of Cook county;
Appeal from the Circuit Court of county;
County Court of county:
he Hon. , Judge, presiding. Heard
the Branch Appellate Court
this court at the term;

222 Ill. 645

ffirmed
eversed
eversed and remanded with directions.

pinion filed Rehearing denied

for appellants.

for plaintiffs in error.

for appellees.

for defendants in error.

RESIDING JUSTICE delivered the opinion of the court.

336 - 26108

HYME LIPSKER,
Appellee,

vs.

DAVID BRAMSON,
Appellant.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

222 I.A. 645

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant by this appeal seeks the reversal of a judgment against him for $356.89, entered upon the verdict of a jury.

Plaintiff, who lives in Billings, Montana, bought some merchandise in Chicago from defendant and paid for the same. These articles, wearing apparel, were packed in boxes by the defendant in Chicago and delivered to a carrier. When the boxes arrived in Billings they were opened by plaintiff, who says a number of articles were missing, the shortage aggregating in value $356.48, which he claims in this suit.

Plaintiff has moved for a dismissal of the appeal on the ground that no assignments of error are attached to the record. This is a mistake, as assignments of error were properly attached to the record filed in this court March 3, 1920. It was not necessary to again attach them to the complete record filed subsequently by permission of the court.

Objection is made by defendant to the admission of certain depositions on the ground that two of plaintiff's exhibits referred to in the deposition were not attached thereto. The exhibits themselves are not of vital importance, as they were confirmatory of what was not disputed. Defendant should have raised this point prior to the trial either by motion to return the commission for correction, or to suppress the depositions. 18 Corpus Juris, page 698. The statute with reference to deposi-

OF COUNTY COURT.

22214.045

4. MOTION BY PLAINTIFF SUPPLEMENTAL TO MOTION OF THE COURT.

Defendant by this appeal seeks the reversal of a judgment granted him for $8886.89, entered on the verdict of a jury.

Plaintiff, who lives in Milfiles, Montana, bought some necklaces in Chicago from defendant and paid for the same. These articles, making apparent, were packed in boxes by the defendant in Chicago and delivered to a carrier. When the boxes arrived in Billings they were opened by plaintiff, who saw a number of articles were missing, the shortage amounting in value $3886.89, which he claims in this suit.

Plaintiff has moved for a dismissal of the appeal on the ground that no assignments of error are included in the record. This is a mistake. An assignment of error was properly included in the record filed in this court March 3, 1907. It was not necessary to make it more than is the complete record filed subsequently by permission of the court.

Objection is made by defendant to the sufficiency of certain documentaries on the ground that the of plaintiff's exhibits referred to in the decision were not included therein. The exhibits themselves are not of that description, as they were contrictory of what was not disputed. Defendant should have raised this point prior to the trial either by motion to return the documents for correction, or to suppress the depositions.

tions, chapter 51, section 30 (Hurd), does not specifically require that exhibits be attached to the deposition, but that they "shall be inclosed, sealed up, and directed to the clerk of the court." This is what was done in this case after they had been properly identified by the commissioner.

Defendant claims that the purchase was made in a job lot and that all that was purchased was packed in boxes and given to an express company to deliver to the railroad, and that they were delivered to the railroad in the same condition as when packed in defendant's store. Plaintiff testified however that they were purchased as different articles at a specified price, and that he paid for them on this basis. There was also evidence tending to show that when the boxes reached the purchaser there were no indications of any tampering or that they had been opened, and that the boxes were packed to full capacity so that they could not, at any time, have contained the articles said to be missing. The evidence in support of the respective theories was properly submitted to the jury, and we cannot say that the jury should not properly have concluded that the shortage arose because the articles were not packed in boxes by defendant and forwarded as per agreement.

Upon the disputed question of fact the conclusion of the jury will prevail, and as there were no reversible errors upon the trial, the judgment is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

171 - [illegible]

[illegible],

Appellant,

vs.

JOHN [illegible], Director General of Railroads, agent of the United States, [illegible] RAILWAY COMPANY, [illegible] COMPANY, CHICAGO & NORTH [illegible] RAILWAY COMPANY and the [illegible] STREET RAILWAY COMPANY, for combination, conspiring and doing business as CHICAGO SURFACE LINES,

Appellees.

[illegible] COURT

[illegible]

MR. JUSTICE McSURLY DELIVERED THE OPINION OF THE COURT.

Plaintiff while a passenger in a street car was injured in a collision between it and a freight car. He brought suit for compensation and upon trial had a verdict and judgment for $4,275. He appeals to this court, asking for a reversal, claiming that the amount is inadequate, that the verdict was produced by the injection into the trial of an immaterial issue, errors of the court in rulings on evidence and the giving of an erroneous instruction. Liability of defendants is not argued.

Plaintiff received his injuries September 24, 1919, and on the same day was taken to the nearby Pullman Hospital, which was also not far from plaintiff's home. It was found that the humerus of the left arm and the right tibia and fibula were broken; there were also lacerations in the perineum and in one hand. After two weeks of apparently proper treatment and favorable progress of the case, at the instance of some neighbors and a Dr. Breakstone, whom plaintiff had then never seen, and without the knowledge of the attending surgeon of the Pullman Hospital, plaintiff was removed in an ambulance to the Norwegian Hospital about twenty blocks away. The man who removed

plaintiff were not physicians and the [illegible] any examination or direction or approval of any doctor who had examined plaintiff. The cast which had been on plaintiff's leg was not on when he was removed, although plaintiff testified he knew the leg was broken and that it ought to be [illegible] still. Dr. Breakstone attended upon plaintiff while at the Burnside Hospital. After plaintiff had been there four days he was removed some fifteen miles away to a hospital in which Dr. Breakstone was a stockholder. There was evidence tending to show that there was no cast on the broken arm and leg at either time of his removal.

Defendants sought to show that plaintiff was negligent with reference to his injuries in making these removals and changes of hospitals and physicians which aggravated his condition, hence defendants were relieved from liability for any damages caused thereby.

The established rule in such cases as stated in Pullman Palace Car Co. v. Bluhm, 109 Ill. 20, is:

> "That plaintiff can not hold defendant accountable for any injury caused, even in part, by the fault of plaintiff in failing to use ordinary care or ordinary judgment, or for any injury not resulting from the fault of defendant, but caused by some new intervening cause not incident to the injury caused by defendant's wrong;" that plaintiff was bound by law to use ordinary care to render the injury no greater than necessary;"

that it was the duty of the person injured to use ordinary prudence in the selection of surgeons and nurses and to select such as were of ordinary skill and care in their profession, and having done so the defendant would be responsible for even those damages which might result from the unskilful treatment of such doctors. Chicago City Ry. Co. v. Saxby, 213 Ill. 374; Hornby v. Ill. C. & Northeastern Ry. Co., 165 Ill. App. 547. If negligent conduct

of a plaintiff with respect to his injury aggravates it. He can not recover damages for the aggravated condition. Elliott on Railroads, 2nd ed., vol. 4, 1304; Kibbell v. City of Grand Rapids, 119 Mich. 659; Brown v. Bridges, 70 Texas, 661; Allender v. C. R. I. & P. R. R. Co., 37 Iowa, 264; Texas & P. Ry. v. White, 101 Ind. 928. If a patient aggravates his injuries by his misconduct he cannot recover resulting damages. Schmidt et al v. Mitchell, 84 Ill. 195; Jones v. Grell, [illegible] Indiana, 376.

In view of the above rule it was proper to present to the jury the conduct of plaintiff with reference to moving to other hospitals and changing to a strange physician as constituting negligence which aggravated his injuries. No point is made in plaintiff's first brief that the jury was not justified from the evidence in believing that this conduct affected him unfavorably.

While the objective conduct of plaintiff [illegible] reference to his injuries may properly be considered, neither his selection of a physician reputed to be of ordinary professional skill, nor such physician's treatment is material as lessening the damages. It is said that defendant's counsel upon the trial improperly injected the competency of Dr. Breakstone and his treatment as issues to be decided by the jury. We can only determine this by consideration of concrete rulings of the trial court upon concrete matters presented at the trial. We cannot review that impalpable thing called "atmosphere" of a trial.

It is said that the court improperly permitted defendant's attorney to pursue a line of questions in cross-examination of Dr. Seindell, the first attending physician, which was not proper upon cross-examination. Technically the

objection on this ground might have been sustained, but the evidence adduced from this witness could readily have been presented at another time from the same witness. A mere irregularity as to order of presenting evidence will not ordinarily be a sufficient reason for reversal. Wills v. Russell, 100 N. Y. 621; California Fruit C. Ass'n v. Lilly, 184 Fed. 570; Westfall v. Hait et al., 165 Indiana, 353.

The cross-examination of Dr. Breakstone touching his failure to procure a city ambulance for the removal of the patient is not of much importance. Plaintiff could not have been prejudiced by any answer the witness might make as to this.

Perhaps a more substantial point is made with reference to the ruling of the court in sustaining an objection to a hypothetical question put to the expert witness, Dr. Krohn. Plaintiff's counsel is right in saying that the reasons given by the trial court for sustaining the objection were insufficient. However, a sufficient reason to sustain the ruling of the court is found in the form of the interrogatory at the conclusion of the hypothetical question, namely: "Can you see, doctor, any connection between the injury assumed in the hypothetical question * * * * and the sluggish nerves, that is, the sluggish response and lack of response of certain nerves below the waistline?" This form falls directly within the disapproval stated in Kinbrough v. [illegible] Co., 272 Ill. 71, "as invading the province of the jury and calling for an opinion on an ultimate fact." Other cases supporting the criticism of this form of question are Schlender v. Chicago & Northern Transition Co., 253 Ill. 164; Pennie v. Reisley, 224 Ill. 210; Moefe v. Armour & Co., 225 Ill. 28, and this court followed in McKatt v. C. B. & Q. R. Ry. Co., 209 Ill. App. 243.

There was no reversible error in giving instruc-

tion number 10. It is too long to quote in full; its substance was that the jury should confine themselves in awarding compensation to those injuries which resulted from the accident. It is a correct statement of the law. That the jury may have considered the conduct of plaintiff above described was not a sufficient reason to refuse the instruction. If plaintiff's counsel apprehended that it might mislead the jury into considering the alleged improprieties of Dr. Breakstone's treatment, this could have been avoided by another instruction accurately limiting the consideration of the jury in this regard, but no such instruction was requested.

The claimed errors above considered are said to have been the cause of a verdict for an inadequate amount of compensation. An experienced physician who examined plaintiff about fourteen days after the injury testified that there was a small comminuted fracture of the humerus. There was no break in the skin. The tibia and fibula of the right leg suffered a compound comminuted fracture; there was also a flesh wound in the perineum which, in the opinion of the doctor, would heal in time without causing permanent injury, and a small wound on the left hand not considered serious. This witness gave his opinion that with proper care plaintiff would have had a fair recovery. Apparently after plaintiff came under the care of Dr. Breakstone there developed profuse suppuration and sloughing, but in time the broken bone united with a good and solid union. The union in the arm is what is called a bridge union, due to the insertion by Dr. Breakstone of a bone plate which threw the callus formation up over the plate; however, this is solid and strong. The injuries to the bones of the leg united in proper alignment and with solid bony union, although one doctor testified that the fibula was not

in good alignment and that this would turn the ankle out one-half inch. Generally speaking there was a solid, bony union in all the fractures. Plaintiff testified he had done no work since his injury and had never tried to do any, but no physician testified that he was incapable of doing physical work, and one of his witnesses, a physician, testified that plaintiff was physically able to do many k nds of work.

The jury awarded plaintiff $4,275, which is no inconsiderable sum. It was asserted without contradiction that there is no case reported in this country, in a personal injury suit, wherein a verdict for this amount has been set aside as inadequate. Sitting as jurors we might have awarded plaintiff a larger amount. We cannot say, however, that the amount is so manifestly inadequate under all the circumstances as to demand a reversal. Disappointed expectations of plaintiff and counsel as to the amount of the award is not a sufficient ground for reversal.

We see no sufficient reason for another trial and the judgment is therefore affirmed.

AFFIRMED.

Dever, P.-J., and Matchett, J., concur.

No. [illegible] 26341.

3M 2-18-21

Action for damages for injuries received by plaintiff in collision of freight car and a street car. Verdict and judgment for plaintiff from which defendants appeal on ground of inadequacy.

or to the Municipal Court of Chicago;
Superior Court of Cook county;
peal from the Circuit Court of county;
County Court of county:
Hon. , Judge, presiding. Heard
the Branch Appellate Court
this court at the term,
irmed
versed
versed and remanded with directions.

nion filed Rehearing denied

for appellants.

for plaintiffs in error.

for appellees.

for defendants in error.

SIDING JUSTICE delivered the opinion of the court.

247 - 26420

THE G. H. HAMMOND COMPANY,
a Corporation,
Appellant,

vs.

PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO., a Corporation, and THE CHICAGO JUNCTION RAILWAY COMPANY, a Corporation,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 646

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

While a horse and wagon belonging to plaintiff and driven by one of its employes was crossing the railroad tracks of defendant The Chicago Junction Railway Company, the horse was struck by a locomotive belonging to defendant Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. Plaintiff brought suit to recover compensation for injuries to the horse. Upon trial the court held that plaintiff was guilty of contributory negligence as a matter of law, and instructed the jury to return a verdict for defendants. Judgment was entered from which plaintiff appeals.

The evidence tended to show that plaintiff's driver was going east on Forty-fifth street; that when he came to the railroad crossing he stopped, looked and listened, and saw nothing. He then started over, when he saw a man on the other side of the track signal him to stop, which he did, but not in time to avoid an approaching locomotive which struck the horse. The man who gave the signal to stop was an employe of plaintiff. The driver says that he crossed at this place nearly every day, as do other persons and wagons; that he had generally seen a flagman around, but on this particular occasion saw no flagman. The driver heard no whistle or bell from the locomotive.

We are of the opinion that the evidence presented a question of fact as to whether the conduct of plaintiff's driver was negligence contributing to the accident and that the trial court was in error in holding that he was negligent as a matter of law. Among many cases supporting our conclusion are Perkins v. Wabash R. R. Co., 233 Ill. 458; Chicago & Alton R. R. Co. v. Adler, 129 Ill. 335; Cleveland v. C. C. C. & St. L. Ry. Co., 169 Ill. App. 157; Wabash R. R. Co. v. Smith, 162 Ill. 583; Schneeweisz v. I. C. R. R. Co., 196 Ill. App. 248.

Defendants specially urge that plaintiff cannot recover because its statement of claim failed to state a cause of action in omitting any allegation that plaintiff was in the exercise of ordinary care, which it is said is essential in a fourth class case in the Municipal court. Whatever uncertainty there has been heretofore in this regard has been definitely removed by the recent decision of the Supreme court filed June 21, 1921, in Sher v. Robinson, where the court, quoting from Enberg v. City of Chicago, 271 Ill. 404, said:

> "Neither does the statement in tort required by said act rise to the dignity of a common law declaration, in our judgment, requiring all the material or ultimate facts of a case to be stated or pleaded."

We hold that plaintiff's statement of claim was sufficient and that the evidence presented a question of fact which should have been submitted to the jury. The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Dever, P. J., and Matchett, J., concur.

267 - 26441

JOHN A. McGARRY et al., Appellants, vs. VILLAGE OF WILMETTE, a Municipal Corporation, et al., Appellees.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

222 I.A. 646

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a companion case to number 26440, same title, consolidated for trial below, in which we have filed an opinion on this date.

In that opinion we gave our reasons for affirming the judgment, and as the determining question is the same in both cases the judgment here is affirmed for the reasons given in the opinion in the other case.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

122 - 15593

[illegible], administrator of the estate of ANDREW LIGNAR, deceased,

Plaintiff in Error,

vs.

[illegible],

Defendant in Error.

[illegible] OF OHIO, [illegible].

222 I.A. 646

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff in this case sued as administrator to recover damages under the statute for the death of his intestate, caused as alleged by the negligence of the defendant.

The declaration charged that the deceased died May 30, 1915, as a result of injuries sustained through being struck by an automobile owned and controlled by the defendant. In the several counts negligence was charged, first, in that the defendant carelessly ran, controlled and operated the automobile; second, that the automobile was driven at a high and dangerous rate of speed; third, that the defendant failed to warn the deceased of the approach of the automobile; and, fourth, that in driving the defendant failed to keep to the right of the center of the street intersection at which the automobile was turned, contrary to the statute. Defendant filed the general issue and the cause was tried by a jury. At the conclusion of plaintiff's evidence the court, on motion of defendant, instructed the jury to return a verdict of "not guilty," and this is the error on which plaintiff relies to reverse the judgment.

The rule to be applied in such cases is well settled. If there is any evidence in the record from which the jury can, without acting unreasonably, find that the material allegations of the declaration or any valid count thereof have been proved, a

motion for a directed verdict should be denied. Devine v. Chicago, 272 Ill. 166; MacGregor v. Shaw, Murdoch & Co., 178 Ill. 464; Casey v. Chicago Hys. Co., 184 Ill. App., 439; Julian v. Anderson, 182 Ill. App., 490; Mehlstedt v. Ideal Lighting Co., 271 Ill. 154; Voss v. Franke, 208 Ill. App. 135.

Several witnesses were produced by plaintiff, a number of whom were eyewitnesses of the accident. The evidence tended to prove that the deceased met his death on May 30, 1916, at the intersection of Chicago avenue and Carpenter street in the City of Chicago, as a result of being struck by defendant's automobile; that deceased, who lived in that neighborhood with his family, was on his way to a doctor's office to get medicine for his family; that he started from the northwest corner of Carpenter street and Chicago avenue; that Carpenter street ran north and south and Chicago avenue east and west; that the deceased walked in an easterly direction near to the cross-walk; that defendant's automobile was, at that time, being driven in an easterly direction on Chicago avenue and about the middle of the street; that when the automobile reached the west line of Carpenter street it was turned to the left and into Carpenter street without going round the center of the intersection of the streets, as required by the statute; that the deceased was struck as aforesaid while walking east near the cross walk, and west of the center of Carpenter street.

One of the witnesses testifies that the deceased tried to step back upon the approach of the automobile. Many of the witnesses testify that the automobile was being driven at a fast rate of speed. The evidence too indicates strongly that no warning was given to the deceased of the approach of the

automobile. We think this evidence offered in plaintiff's behalf tended to prove negligence, as alleged in one or more of the counts, and that it was error to peremptorily instruct the jury, unless it may be said that there is merit in the contention of defendant in error that the evidence fails to affirmatively establish that the deceased was in the exercise of due care.

While the allegation of due care is, under the decisions, a material allegation which it was necessary for the plaintiff to prove, it was not necessary that it should be established by direct and positive evidence. It is sufficient if it may be reasonably inferred from the evidence. Hjertaas v. Game Bros. Co., 189 Ill. App. 113. The deceased was not bound to anticipate the negligence of defendant. He had a right to presume that defendant would obey the law. McFarland v. Jackson, 189 Ill. App. 453; Koepke v. C. B. I. & P. Ry. Co., 290 Ill. App. 247.

Under all the circumstances disclosed by the evidence we think it was for the jury to say whether deceased was or was not guilty of contributory negligence.

For the error indicated the judgment will be reversed and the cause remanded for another trial.

Reversed and remanded.

Dever, P. J., and McBurney, J., concur.

156 - 25927

[illegible],
Appellant,

vs.

NICK GOVAS,
Appellee.

APPEAL FROM THE HIGH COURT OF CYPRUS.

222 I.A. 647

MR. JUSTICE MACKINNON DELIVERED THE OPINION OF THE COURT.

The plaintiff below, who is appellant here, brought suit on a promissory note made by the defendant to plaintiff's order, dated May 10, 1918, in the sum of £600 with interest at 6 per cent., to be paid October 1, 1919. The note contained a power to confess judgment and judgment was confessed upon it. Later this judgment was opened up and leave given defendant to plead. Three pleas, non-assumpsit, payment, and that the note was obtained by fraud and circumvention, were filed and the cause was tried by the court without a jury. The court found for the defendant and entered judgment against the plaintiff.

On the trial plaintiff introduced the note in evidence and testified that no part of it had been paid. He further testified that he went into business with the defendant a couple of days after the note was signed; that he paid £950 for an interest in defendant's business, and this sum together with £600 loaned, and for which the note was given, made a total of £1550, which he turned over in cash to defendant at his, plaintiff's, place of business on the day the note was made and delivered. He testified that at that time he, plaintiff, took the money from a safety deposit vault where it was kept by him. Plaintiff also produced a receipt written in the Greek language, to which was attached the signature of the defendant and which translated reads:

"Chicago, May 5th, 1918.

The undersigned, Nicholas Govas received from Alexios Koulopoulos One thousand Five Hundred fifty dollars, number 1550, declares to sell one half interest in the shine at 957 Belmont Avenue to Alexios Koulopoulos for the sum of $950, and for the balance to sign a note. The debtor.

NICK GOVAS."

The defendant testified that he cannot read or write the English language, and cannot read the Greek language very well. He positively denies that plaintiff gave him $1550. Defendant agrees that the half interest in the shoe shine business was sold for $950, but says that as a matter of fact this transaction occurred June 13th, after the making of the note; that plaintiff paid him for this interest in the business $350 in cash, and was to return the note for $600 in payment of the balance, but that he never returned the note. Defendant admits the signature to the receipt is genuine. The body of the receipt is in the handwriting of the plaintiff.

The defendant's version of the transaction is corroborated in the record by the witness Logiosion, who testifies he was present when the note was made, and later when the proposition was made and accepted to sell to the plaintiff a half interest in the business at 957 Belmont avenue. He says that the sale was for $350 in cash, and that the rest of the purchase price was to go in payment of the note, but that plaintiff could not then find the note. Defendant is also corroborated by one Hellinger, a real estate dealer, who testifies that the deal for the purchase of the shoe shine business was completed in his office on June 13, 1918; that he then drew the bill of sale by which the conveyance was made, and he says that he told the defendant to hold the bill of sale until plaintiff could find the note, but that defendant said, "Why, we are all one relation, are all cousins, and we will agree with ourselves." The defendant's contention is also corroborated by

the witness Weinhart, who testifies that he was present at that time and that plaintiff said to the defendant, "I will give you that note tomorrow." The testimony of these witnesses is to a certain extent corroborated by the bill of sale, which is in evidence, dated June 13th, 1918.

It is apparent that some one has testified falsely in this case. The Judge, who saw the witnesses, was in a much better position to discover who so testified than are we. With some doubt, we affirm.

OPINION.

Dever, P. J., and McGurely, J., concur.

175 - [illegible]

[illegible],
Appellee,

vs.

[illegible] et al.
[illegible],
Appellant.

222 I.A. 647

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This case has been twice tried by a jury and a verdict for the plaintiff appellee was returned in both trials. Before its submission to the jury plaintiff withdrew all the counts in his declaration with the exception of the last additional count, which charged that defendant by his servants drove and propelled a certain automobile on a public street in a wanton and reckless manner, by means whereof plaintiff was injured, etc.

One of the alleged errors argued is that the motion in arrest of judgment should have been granted because no plea was filed to the last additional count nor any rule entered on defendant to plead to it. A plea of the general issue was filed to the original declaration. Under a similar state of facts we held against the same contention in Voss v. C. J. [illegible] L., [illegible] Ill. App. 105. It only remains therefore to construe the other error assigned, that the evidence was insufficient to sustain the allegations of the declaration upon which the cause was submitted to the jury.

The controlling question in the case is whether the driver of the automobile was guilty of such reckless conduct and disregard of the rights of plaintiff as to make the injury sued for "wilful" and "wanton" within the meaning of these terms as used in law. None of the facts are undisputed. The plaintiff was one of a group of laborers and was returning to his home at about 4:30 p. m. on April [illegible], 1913. [illegible]

on Twenty-second street, which extends east and west and is intersected by Kedzie avenue, which extends north and south. He alighted at Twenty-second street and Kedzie avenue for the purpose of taking a northbound streetcar on Kedzie avenue. Such a car was then standing on the west track on Kedzie avenue. The doors of the car were not yet opened, and with a group of other people he stood there facing the car and awaiting the opening of the door. While thus standing he came in contact with the automobile driven by defendant's servant and received injuries which it is admitted are quite serious.

The automobile was proceeding north on Kedzie avenue. It had stopped at the south side of Twenty-second street, which is a dangerous intersection and a traffic policeman was stationed there. He permitted the defendant to proceed, which defendant thereupon did, crossing Twenty-second street directly towards the standing streetcar which plaintiff was about to enter. As the automobile approached the streetcar it turned towards the northeast and in attempting to pass plaintiff came in contact with and injured him.

The evidence indicates that no warning was given, that there was no attempt made to stop the automobile or reduce its speed; but the testimony of defendant's witnesses is to the effect that the automobile was moving very slowly, at a speed of from about one and a half to three miles an hour. One of defendant's witnesses says:

> "We were going quite slowly, well, just about a couple of miles an hour, and a man just laid over against the back fender gently, just as though he was going to take a rest, then he reeled gently off the fender onto the ground."

On the other hand, the witnesses for plaintiff testify that the automobile was going at a speed of from seven to

twenty miles an hour, recklessly, without any attempt to warn plaintiff or others of the danger or to prevent the accident in any way.

The serious nature of plaintiff's injuries, which is admitted by the defendant, makes it difficult for us to believe that the automobile was being driven in such a gentle manner as the evidence for defendant would indicate. The jury and the trial Judge, who saw and heard the witnesses, evidently did not think so, and the jury was fully and properly instructed as to the law. It is not easy to determine the line which divides negligence from conduct which is so reckless as to be properly defined as "wilful" or "wanton" within the meaning of the law. Ordinarily whether given conduct is or is not "wanton" or "wilful" is for the jury, if there is any evidence from which it may reasonably so find. The law to be applied has been set forth by our Supreme court in Baldwin Express Co. v. Krug, 91 Ill. 472. Under the rules there laid down we cannot say here, as a matter of law, that the verdict of the jury is without reason, nor can we, reviewing the facts, as it is our duty to do, say that the evidence would justify this court in finding the facts contrary to the verdict of the jury, which has been approved by the trial judge. In Baldwin Express Co. v. Krug, supra, the court said:

> "An intentional disregard of a known duty necessary to the safety of the person or property of another, and an entire absence of care for the life, person or property of others, such as exhibits a conscious indifference to consequences, make a case of constructive or legal wilfulness, such as charges the person, whose duty it was to exercise care, with the consequences of a wilful injury."

We think the jury might reasonably find such want of care from the evidence in this case. Contributory negligence

is not a defense to the cause of action, as alleged in the last additional count of plaintiff's declaration.

Affirmed.

Gover, P. J., and McBurney, J., concur.

236 - 26008

2221 I.App. 647

ALLEN KOSAR,
Appellee,

vs.

MORRIS JOSEPH,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff appellee sued the defendant in an action on the case for damages from injuries sustained by plaintiff through being struck by an automobile driven by defendant in Douglas Park, near the intersection of Douglas boulevard and Sacramento avenue. The accident occurred June 22, 1913.

Douglas boulevard is a street some 45 or 50 feet wide, which extends in a general northerly and southerly direction, but at the point where the accident occurred turns and runs west to the west boundary of the park, and across Albany avenue, a street which runs directly north and south. Sacramento boulevard runs almost north and south and intersects Douglas boulevard at or near the point where the same turns in a westerly direction. These streets run flush with the grass and a few feet back from the grass is shrubbery some five or six feet high, and some trees. After turning west Douglas boulevard widens some 200 feet into an area where several roadways meet and in the center of this area is a fountain.

Plaintiff, just prior to the accident in question, was riding a motorcycle going south in Sacramento avenue on the right hand side of the road, and at a speed of from ten to fifteen miles per hour. The roads were dry and paved with asphalt and the day was clear.

The evidence for plaintiff tended to show that as

he approached Douglas boulevard near the point where it widens out he turned slightly to the south proceeding along near the west line of Sacramento avenue projected into Douglas boulevard, and intending to go south on the right side of that boulevard. That just previous to the accident the defendant was driving his automobile northwest on Douglas boulevard with the intention of leaving the park at the west entrance; that he was driving near the center of the boulevard at a speed of from 15 to 20 miles per hour; that he passed a horse and buggy on his right, then suddenly turned and without warning turned to the left cutting across the boulevard at the southwest corner and on the wrong side of the street; that he ran directly into the side of plaintiff's motorcycle at a point about five feet away from an electric light post, which stood near the south side of the intersection.

Plaintiff testified that he tried to turn his motorcycle out of the way upon the approach of the automobile, but was unable to do so. Defendant, on the other hand, contended that plaintiff did not come from the north, but on the contrary, came from the west around a curve in the road; that his approach was concealed by the shrubbery and that without any warning he ran into defendant, who, as he, defendant, claims had kept to the right of Douglas boulevard. Defendant's witnesses fixed the place of the accident some 20 feet further north on Douglas boulevard than plaintiff claimed. This conflicting evidence was submitted to the jury, which was fully and accurately instructed as to the law applicable, and it returned a verdict for plaintiff in the sum of $2,000 on which judgment was entered.

Appellant contends that the court erred in refusing certain instructions asked in his behalf, but while these

instructions stated abstract propositions of law accurately the same points were fully covered by other instructions . There was, therefore, no error in that respect. North Shore Street Railway v. Strathmann, 213 Ill., 252.

Defendant also argues that the verdict of the jury is against the weight of the evidence. If the theory of the defendant was correct he was guilty of no negligence, and contributory negligence on the part of the plaintiff would bar recovery. But the jury has found against defendant on the facts. We have examined the evidence carefully and we think the theory of plaintiff is sustained by the larger number of witnesses, who, with the exception of plaintiff, are disinterested and seem to have testified without prejudice. The verdict of the jury was justified and the judgment will be affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

instructions stated erroneous propositions of law concerning his requests for points were their inserts to other instructions. There was, therefore, no error in this respect. [illegible] Great Railway v. Patterson, 222 Ill., 222.

Defendant also argues that the verdict of the jury is against the weight of the evidence. If the theory of the defendant was correct he was guilty of no negligence, and contributory negligence on the part of the plaintiff would bar recovery. But the jury has found against defendant on the facts. We have examined the evidence carefully and we think the theory of plaintiff is sustained by the larger number of witnesses, who, with the exception of plaintiff, are disinterested and seem to have testified without prejudice. The verdict of the jury was justified and the judgment will be affirmed.

AFFIRMED.

Davis, P. J., and Brentano, J., concur.

309 - 26081

NELLIE HANCOCK,
Appellee,

vs.

NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 647

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant issued a benefit certificate on the life of one Patrick Foley in the sum of $2000, payable to the sister of said Foley, Nellie Hancock, the plaintiff, upon the death of the assured. The policy issued on the 16th of October, 1914. Patrick Foley died on the 10th day of April, 1916. The immediate cause of his death was pneumonia. The plaintiff presented proofs of death but payment was refused. When sued appellant set up as a defense that the assured made false statements in his application for the policy, particularly that he falsely stated that he was employed by James Gleason, and as a sewer builder; that neither of his parents had been afflicted with consumption; that he himself had never had consumption or cough (habitual); that his mother died at the age of seventy-six years, after a sickness of one year, from senility.

The defendant insisted upon the trial and now here claims that these statements made by Patrick Foley were in the nature of warranties, and that as they were untrue the policy is void. At the conclusion of all the evidence the defendant moved the court to instruct the jury in its favor, which was denied. The cause was submitted to the jury and a verdict for plaintiff was returned. Motions for a new trial and in arrest of judgment were overruled and judgment entered on the verdict.

The appellant contends that the court should have held the alleged false statements to be warranties and should have instructed the jury to find in its favor as a matter of law. It contends further that although the alleged false statements should be held to be merely representations and not warranties, nevertheless the statements related to material matters, and were false and therefore preclude recovery.

The certificate states on its face that it is issued -

> "in consideration of the agreements and warranties contained in application and medical examination." That "this beneficiary certificate is issued by the said National Council and accepted by the member only upon the following express warranties, conditions and agreements. First, that the application for membership in this order, made by said member, together with the report of the medical examiner which is on file in the office of the National Secretary, and both of which are a part hereof, are true in all respects, and each and every part thereof, shall be held to be a strict warranty, and to form the only basis of the liability of the Order to such member or said member's beneficiaries, the same as if fully set forth in this certificate, and that the application and medical examination herein referred to and the constitution and laws of the Society, as the same now exist or may be hereinafter enacted, and this beneficiary certificate shall all be construed together as forming parts of the contract between the National Council and the member. Second, that if said application and medical examination shall not be true in each and every part thereof, then this beneficiary certificate shall, as to said member or said member's beneficiaries, be absolutely null and void. Third, that this certificate is issued in consideration of the warranties and agreements made by the person named in this certificate in the said member's application to become a member of this Order. * * * "

At the end of the application, a photographic copy of which was attached to the policy, appears the following statement:

> "I further declare and agree that I have verified each of the foregoing answers and statements from 1 to 45 inclusive, and that I know and understand the contents thereof, and that the answers and statements as written therein are as given by me."

Only eight of the 45 questions are abstracted. The by-laws of the appellant, offered in evidence, are also abstracted in part only. Section 86 provides:

"No member * * * shall * * * be entitled to be paid any sum * * * * who on application for beneficiary membership has given false answers regarding his age, family history or mental condition."

Section 88 provides:

"In case any person shall make false representations in his application or medical examination, for membership, either as to his physical or mental health or condition, age, or family history, or as to any other fact, or shall conceal any of his personal habits that are a violation of the laws of the Order, or shall conceal any other fact affecting the risk, neither such person nor his beneficiary or beneficiaries, shall be entitled to receive any benefits by reason of a beneficiary certificate having been issued to him."

The report of the medical examiner is not in the record, but the evidence shows that Patrick Foley was examined by a medical examiner of the Insurance Company prior to the issuance of the policy. This medical examiner, however, was not called as a witness. The burden of proof was on the defendant to prove the allegations of the affidavit of merits. Continental Life Ins. Co. v. Rogers, 119 Ill. 474.

As to the allegation that deceased falsely stated that his occupation was that of a sewer builder, employed by Mr. James Gleason, it was, we think, clearly established by the evidence that such statement was not false. As to the further allegations that Patrick Foley stated falsely that he did not have and never had a cough "habitual"; that he did not have and never had consumption, the evidence was conflicting, and the jury having found for plaintiff, we do not think we can say that the verdict is, in these respects, against the weight of the evidence. In these respects therefore, whether these statements are to be considered warranties, as appellant contends they should be, or merely as representations, which is the contention of the appellee, is not, we think, material.

The case therefore turns on the question of whether the statements made by the deceased in his application to the ef-

"No member * * * shall * * * be entitled to be paid any sum * * * * due or application for benefiction for benefiction membership has given false or misleading information as to his physical or mental condition."

Section 21, provides:

"In case any person shall make false representation in his application or medical examination, for membership, either as to his physical or mental health or condition, age, or family history, or as to any other fact, or shall conceal any of his personal habits that are a violation of the laws of the Order, or shall conceal any other fact affecting the risk, neither such person nor his beneficiary or beneficiaries, shall be entitled to receive any benefits by reason of a beneficiary certificate having been issued to him."

The report of the medical examiner is not in the record, but the evidence shows that Patrick Foley was examined by a medical examiner of the Insurance Company prior to the issuance of the policy. This medical examiner, however, was not called as a witness. The burden of proof was on the defendant to prove the allegations of the affidavit of merits. Continental Life Ins. Co. v. Rogers, 119 Ill. 474.

As to the allegation that deceased falsely stated that his occupation was that of a sewer builder, employed by Mr. James Flanagan, it was, in fact, simply established by the evidence that such statement was not false. As to the further allegations that Patrick Foley stated falsely that he did not have and never had a cough "habitual"; that he did not have and never had consumption, the evidence was conflicting, and the jury having found for plaintiff, we do not think we can say that the verdict is, in these respects, against the weight of the evidence. In these respects further, counsel have discussed, or in discussing arguments, we should strongly doubt if, or merely as mere assertions, which is the substance of the opposition, is not, as stated, material.

The case therefore turns on the question of whether the statements made by the deceased in his application to the of-

fect that his mother died at the age of 76 of senility, and that neither of his parents had been afflicted with consumption, were false in fact, and if false, avoid the policy. The appellants insist that these and all other statements made in the application must be considered as strict warranties. If these statements are to be so construed, and are in any respect false, then it is elementary the plaintiff can not recover. This is the settled law, as established by many cases.

In the consideration of insurance contracts a warranty is an express stipulation in the policy, on the literal truth or fulfilment of which the validity of the policy depends. It has the force of a condition precedent and must be literally and strictly applied whether material to the risk or not, whether the insured believed it to be true or not and, according to some authorities, whether the insurance company knew it was false at the time of making the contract. The failure of the thing warranted can only be excused by the act of the insurer, by the law itself, or by the act of God.

> "One of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement. The only question is, has the warranty been kept. There is no room for construction, no latitude, no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed."

May on Insurance, 3rd ed., chap. 8, sec. 156.

The harshness of such a rule, as applied to the business of life insurance, has been often commented upon; and in most states statutes have been enacted to give relief from the abuses which the insertion of such provisions in contracts of insurance brought about. The tendency of the courts, as indicated by the decisions, is to construe the statements in

such a contract, as representations rather than warranties. The rule in Illinois is thus stated in a recent case.

> "It is only in cases where the policy will admit of no other construction, that a statement contained therein will be construed as a warranty." Weisguth v. Supreme Tribe of Ben Hur, 272 Ill., 541.

It is apparent from the decisions that even where the policy expressly declares that given statements are made a part of it, and construed as warranties, (which is the case here) nevertheless, this is not conclusive; and if from a consideration of the whole contract it is apparent that it is the intention of the parties that such statements shall be considered as representations, such construction will be adopted .

In the instant case, what we must consider the whole of the contract is not before us. Only a part of the questions and answers are abstracted. The report of the medical examiner, which is expressly declared to be a part of the contract, is not in evidence; only a part, also, of the by-laws, expressly made a part of the contract, are abstracted. These by-laws, however, in the article thereof dealing with the effect of false statements refers to the same as "representations", and no reference to warranty appears in connection with the same. By some authorities, in such a state of the record, the statements of fact will be regarded as representations, not warranties. Teeple v. Fraternal Bankers' Reserve Society, 179 Ia., 65; Reppond v. National Life Ins. Co., 11 L. R. A. N. S., 981.

We have examined the application in full as it appears in the record. It seems to cover most of the ailments to which human beings are subject. Eighty-one specific diseases are mentioned, including catarrh, gout, indigestion, insomnia, neurasthenia, "or any disease of veins or vertigo." One of the forty-five questions asked is "Have any of your grandparents,

such a contract, as representations rather than warranties.

The rule in Illinois is thus stated in a recent case.

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> Reinhardt v. Supreme Tribe of Ben Hur, 272 Ill., 521.

It is apparent from the decisions that even where the policy expressly declares that given statements are made a part of it, and construed as warranties, (which is the case here) nevertheless, this is not conclusive; and if from a consideration of the whole contract it is apparent that it is the intention of the parties that such statements shall be considered as representations, such construction will be adopted.

In the instant case, what we must consider the whole of the contract is not before us. Only a part of the questions and answers are abstracted. The report of the medical examiner, which is expressly declared to be a part of the contract, is not in evidence; only a part, also, of the by-laws, expressly made a part of the contract, are abstracted. These by-laws, however, in the article thereof dealing with the effect of false statements refers to the same as "representations", and no reference to warranty appears in connection with the same. By some authorities, in such a state of the record, the statements of fact will be regarded as representations, not warranties. Keeley v. Fraternal Knights' Benefit Society, 1[illegible] Ia., 96; Ingersoll v. Railway Life Ins. Co., 11 L. R. A. N. S., 863.

We have examined the application in full as it appears in the record. It seems to cover most of the ailments to which human beings are subject. Ninety-one specific diseases are mentioned, including malaria, gout, lumbago, tinnitus, neurasthenia, "or any disease of veins or vertigo." One of the forty-five questions asked is "Have any of your grandparents

or either of your parents, or your brothers or sisters, or your wife or husband or children or any of your uncles or aunts, been afflicted with consumption, scrofula, cancer, insanity, epilepsy or heart disease?" When we consider the nature of the contract made and its purpose, it seems impossible to believe that it could have been the intention of both the parties that all answers to these questions should be regarded as warranties, which would prevent a recovery in case of the slightest misstatement, although made in the best of faith. If it was the intention of the company that each answer should be so considered, then it would seem that "Beneficiary Certificate" was a misnomer for the contract delivered.

We think the statements alleged to be false must be considered as mere representations and not warranties. Minnesota Mutual Life Ins. Co. v. Link, 230 Ill., 272; Moulor v. American Life Ins. Co., 111 U. S., 335; Continental Life Ins. Co. v. Rogers, supra.

But appellant contends that whether considered as warranties or representations, the answers of the assured avoided the police. A misrepresentation in insurance has been defined as "an oral or written statement made by the assured or his authorized agent, * * of something as a fact, which is untrue, is known to be untrue, and is stated with intent to mislead or deceive, or which is stated positively as true, without its being known to be true, and which has a tendency to mislead; such statement, relating in both cases to material facts." Joyce on Insurance, Vol. 2, sec. 1884. From this definition it is apparent that fraud is the gist of such a misrepresentation as will avoid the contract.

There was evidence tending to show that the age of the mother of Patrick Foley at the time of her death was misstated in the application, in that while the application stated

or either of your parents, or your brothers or sisters, or your wife or husband or children or any of your uncles or aunts, been afflicted with consumption, apoplexy, cancer, insanity, dropsy or heart disease?" When we consider the nature of the contract made and its purpose, it seems impossible to believe that it could have been the intention of both the parties that all answers to these questions should be regarded as warranties, which would prevent a recovery in case of the slightest misstatement, although made in the best of faith. If it was the intention of the company that each answer should be so considered, then it would seem that "Beneficiary Certificate" was a misnomer for the contract existing.

We think the statements alleged to be false must be considered as mere representations and not warranties. Kingsbury Mutual Life Ins. Co. v. Lenk, 290 Ill., 474; Conlon v. Provident Life Ins. Co., 111 U. S., 624; Connecticut Life Ins. Co. v. Langer, supra.

But appellant contends that whether considered as warranties or representations, the answers of the assured avoided the policy. A misrepresentation in insurance has been defined as "an oral or written statement made by the assured or his authorized agent, * * of something as a fact, which is untrue, is known to be untrue, and is stated with intent to mislead or deceive, or which is stated positively as true, without its being known to be true, and which has a tendency to mislead; such statement, relating in both cases to material facts." Joyce on Insurance, Vol. 2, sec. 1884. From this definition it is apparent that fraud is the gist of such a misrepresentation as will avoid the contract.

There was evidence tending to show that the age of the mother of Marvin Boley at the time of her death was min-

that she died at the age of seventy-six, she was in fact not more than sixty-five and possibly not more than fifty-seven years of age at that time. That such a misstatement might be a material fact, we do not doubt, but we think the evidence fell short of establishing that it was such a misrepresentation as would avoid the contract in that it failed to show that it was made with the knowledge of, or with the intention of deceiving, or that defendant relied upon it. In fact, in its reply brief appellant disclaims any intention to make a defense on that alleged misstatement alone, saying, "We have no defense, and intended to make no defense based upon the question alone, as to the age of the mother of Patrick Foley. Our defense goes entirely to the more material question, as to the cause of her death - that is, whether she died of consumption instead of senility or old age, as is stated by applicant."

The only evidence tending to prove that the mother of the insured ever had consumption and died therefrom, is contained in the undertaker's report of death of one Mary Foley. The report states the place of birth of the deceased is Ireland; her age fifty-seven years; that she died on the 11th day of January, 1907, a widow; that she was by occupation a housekeeper; that she died at 224 Aberdeen street; was buried at Mount Carmel on January 14, 1907; that M. J. Redmond was the undertaker.

Included in this report is a physician's certificate of cause of death as follows: "I hereby certify that to the best of my knowledge and belief, the cause of death of the above named described deceased, was as hereunder written. Cause or causes of death. Immediate and determining pulmonary tuberculosis. Duration one year. Witness my hand this 11th day of January, 1907. Address 1543 W. 12th Street. T. F. O'Malley, M.D."

The plaintiff objected to the introduction of the

that she died at the age of seventy-six, she was in fact not more than sixty-five and possibly not more than fifty-seven years of age at that time. That such a misrepresentation might be a material fact, we do not doubt, but we think that evidence tending to show that it was made with the knowledge of, or with the intention of deceiving, or that defendant relied upon it. In fact, in its reply brief appellant disclaims any intention to make a defense on that alleged misrepresentation alone, saying, "We have no defense, and intended to make no defense based upon the question alone, as to the age of the mother of Patrick Haley. Our defense goes entirely to the more material question, as to the cause of her death - that is, whether the act of commission (?) of suicide is old age, as is stated by appellant."

The only evidence tending to prove that the insured had consumption and died overtrum, is contained in the undertaker's report of death of one Mary Haley. The report states the place of birth of the deceased is Ireland; her age fifty-seven years; that she died on the 11th day of January, 1907, a widow; that she was by occupation a housekeeper; that she died at 224 Aberdeen street; was buried at Mount Calvary on January 14, 1907; that R. J. Redmond was the undertaker.

Included in this report is a physician's certificate of cause of death as follows: "I hereby certify that to the best of my knowledge and belief, the cause of death of the above named described deceased, was as hereunder written. Cause or causes of death. Immediate and determining pulmonary tuberculosis. Duration one year. Witness my hand this 11th day of January, 1907. Witness: [illegible]. [illegible], M.D."

The plaintiff objected to the introduction of the

report of the undertaker in evidence and was overruled; afterwards moved to strike it out but the motion was denied. Cross-errors, however, have not been assigned. However, if it be conceded that the evidence was competent, it falls short of establishing the defense, for the reason that there is an entire absence of testimony tending to show either that Patrick Foley knew of the falsity of the representation, or that defendant regarded it as material and relied upon it. In Globe Mutual Life Ins. Ass'n v. Meyer, 118 Ill. App., 180, the court said, where a similar certificate was excluded: "But had the physician's report of the cause of death been admitted in evidence, it would not have tended to prove that the cause was known to the assured."

The defense was therefore not established.

Complaint is also made as to the instructions. While the court should have told the jury whether the alleged false representations were warranties or representations, we think the defendant was not prejudiced by the failure so to do.

The judgment will be affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

report of the undertaker in evidence and was overruled; afterwards moved to strike it out but the motion was denied. Grounds, however, have not been assigned. However, if it be conceded that the evidence was competent, it falls short of establishing the defense, for the reason that there is an entire absence of testimony tending to show either that Patrick Daly knew of the fatality of the representation, or that defendant regarded it as material and relied upon it. In Mutual Life Ins. Co. v. Hayes, 112 Ill. App., 180, the court said, where a similar certificate was excluded: "But had the physician's report of the cause of death been admitted in evidence, it would not have tended to prove that the cause was known to the assured."

The defense not therefore had validity.

Complaint is also made as to the instructions. While the court should have told the jury whether the alleged false representations were warranties or representations, so that one instruction was not prejudicial by the failure so to do.

The judgment will be affirmed.

AFFIRMED.

Dever, P. J., and Kennedy, J., concur.

356 - 26171

McNEIL AND HIGGINS CO., a Corporation, Appellant,

vs.

NEENAH CHEESE AND COLD STORAGE CO., a Corporation, Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 648

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff appellant and defendant entered into the following memorandum:

"Chicago, 8/2/1917

Sold to McNeil & Higgins Co. (Buyer)

For account of Neenah Cheese Co. (seller) 300 boxes fancy white Twin Cheese 21c subject to inspection, to be shipped to Western Cold Storage Pier House, F.O.B. Chicago.

Seller guarantees prompt delivery. * * * * *

Seller guarantees buyer that said merchandise will be satisfactory to McNeil & Higgins Company * * *."

The statement of claim alleged that defendant delivered to plaintiff cheese of an inferior grade, which plaintiff refused to accept, and that plaintiff was compelled to go into the market and buy the cheese at a loss of the sum claimed, $415.50, in order to keep its contracts with its customers to whom the cheese had been resold.

The affidavit of merits set up that the cheese tendered by the defendant to plaintiff was of the kind sold, that the sale was subject to inspection, and alleged a custom in the City of Chicago that where cheese is sold "subject to inspection" and refused by the buyer when tendered, the obligations of both buyer and seller with respect thereto terminate.

The cause was tried by the court without a jury. The court found as facts that the parties contracted with reference to a specific car of cheese; that the car of cheese tendered

to the plaintiff reasonably answered to the description of "fancy white cheese," as specified in the contract of sale; that according to the established custom in the wholesale cheese trade of Chicago, sales made subject to inspection mean that if the buyer rejects the goods tendered the contract is terminated.

The court further held as propositions of law that the defendant having tendered to plaintiff 300 boxes of cheese reasonably answering to the description of the cheese specified in the contract entered into between the parties, and the plaintiff having rejected and refused to accept said cheese, the contract must be regarded as rescinded on the part of the plaintiff, and the defendant released from any further obligation thereunder. Further, that if a buyer, upon inspection of goods reasonably answering to the description specified in the contract of sale, rejects the same, the seller is released from any further obligation under the contract; that the defendant having delivered to the plaintiff 300 boxes of cheese designated by several witnesses as "fancy white twin cheese," plaintiff was not entitled to recover in an action based on failure of delivery.

From the judgment entered for defendant the plaintiff appealed to the Supreme court and there argued that section 71 of "The Uniform Sales Act," approved June 29, 1915, Hurd's Revised Statutes 1919, chap. 121a, page 2670, is unconstitutional and void. The Supreme court held that the constitutional questions argued were not properly raised on the record, and transferred the cause to this court. McNeil and Higgins Co. v. Neenah C. & C. S. Co., 290 Ill. 449.

It therefore remains for us to consider only other errors assigned and argued, which are that the court admitted im-

proper evidence over objection, and that the finding of the court is contrary to the weight of the evidence.

As to the alleged error argued on admission of evidence, it is sufficient to say that as the trial was by the court, the admission of incompetent evidence would not be reversible error if there is sufficient competent evidence in the record to sustain the finding of the court. There is such evidence here. The written memorandum of sale provided that the goods were sold "subject to inspection," and we think the court properly received evidence as to the meaning of this phrase and the general custom and usage of the market with respect to the construction of such contracts, where the buyer refuses to accept the goods tendered. Samuels v. Oliver, 130 Ill. 73; Taylor v. Bailey, 169 Ill. 181; Steidtmann v. Joseph Lay Co., 234 Ill. 84; Collins Ice Cream Co. v. Stephens, 189 Ill. 260; Section 71 Uniform Sales Act supra.

We think the finding of facts as made by the court is abundantly supported by the evidence and that the court properly applied the law to the facts. The judgment is just and it is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

425 - 26599

H. H. EVANS et al.,
Complainants,

vs.

ILLINOIS SURETY COMPANY,
Defendant.

HANNAH SCHROEDER Individually
and as Next Friend,
Appellant,

vs.

JAMES S. HOPKINS, Receiver, etc.,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

222 I.A. 648

426 - 26600

H. H. EVANS et al.,
Complainants,

vs.

ILLINOIS SURETY COMPANY,
Defendant.

MARGUERITE RAPP Individually
and as Next Friend,
Appellant.

vs.

JAMES S. HOPKINS, Receiver, etc.,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the claimants from an order dismissing their respective claims against the receiver of the Illinois Surety Company. These claims came on for hearing upon exceptions of the claimants to the report of a master in chancery to whom the claims had been referred. The exceptions were overruled.

The material facts appear to be that on the 8th day of December, 1913, the Illinois Surety Company executed its bond as surety for one Peter Moscrey in the penal sum of $5000.

The bond recited that the principal had made application for a license to sell spirituous liquors of different kinds in the Tenth ward of the City of Omaha, Nebraska, and the condition of the bond was that the principal would not violate the ordinances of the city or the laws of the state, and would pay all damages, fines and penalties which might be adjudged against him under the law. Thereafter the claimant, Hannah Schroeder, individually and as guardian for her minor children, brought a suit on this bond in Douglas County, Nebraska, and recovered a judgment in the sum of $5000 against both principal and surety. An appeal was taken to the Supreme court of Nebraska, where the judgment was affirmed with costs. This judgment has never been paid. A transcript of it duly certified was admitted in evidence upon the hearing of the claim, and it was also made to appear that the court in which the judgment was obtained was a court of general jurisdiction.

The sole ground upon which the master recommended the dismissal of the claim was "that it appears from the record that the judgment entered in the said District court of Douglas County, Nebraska, was rendered in a suit to recover damages for a death occurring in the state of Nebraska." The master therefore found that as it was provided by statute in this state that no action should be brought or prosecuted in this state to recover damages for death occurring outside of the state, the court was without jurisdiction to allow the claim. The statute in question is section 2 of the Illinois Injuries Act, Hurd's Revised Statutes 1919, chapter 70. The authority relied upon by the master was Kenney v. Loyal Order of Moose, 285 Ill. 188. However, pending this appeal, the Supreme court of the United States, reversing

The bond recited that the principal had made application for a license to sell spirituous liquors at different times in the North ward of the City of Omaha, Nebraska, and the condition of the bond was that the principal would not violate the ordinances of the city or the laws of the state, and would pay all damages, fines and penalties which might be assessed against him under the law. [illegible] in Douglas County, Nebraska, and recovered a judgment in the sum of $5000 against both principal and surety. An appeal was taken to the Supreme court of Nebraska, where the judgment was affirmed with costs. This judgment has never been paid. A transcript of it duly certified was admitted in evidence upon the hearing of the claim; and it was also made to appear that the court in which the judgment was obtained was a court of general jurisdiction.

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the judgment of the Supreme court of Illinois, has held that section 2 of that statute is void, as contrary to the Constitution of the United States. Kenney v. Loyal Order of Moose, 40 Supreme Court Reporter, 371.

Aside from this, however, we do not think the claim should have been dismissed for the reason that the Injuries Act is by its terms applicable only to causes of action ex delicto, which did not exist at the common law; Crane v. Chicago & Western Indiana R. R. Co., 233 Ill. 259; Prouty v. City of Chicago, 250 Ill. 222; while the action disclosed by the suit brought on the bond was an action ex contractu. Koski v. Pakkala, Adm., et al., 141 N. W. 793; Sullivan et al. v. Radzuweit, 118 N. W. 571; Andresen v. Jetter et al., 107 N. W. 789; Murphy, Adm. v. Willow Springs Brewing Co., 81 Neb. 223; Kramer v. Bankers Surety Co., 90 Neb. 301.

Appellee also argues that the Schroeder appeal should have been taken to the Supreme court, but this point is obviously without merit. There is therefore no reason why the claim of Hannah Schoreder should not have been allowed.

As to the claim of Marguerite Rapp et al., a similar judgment was entered in the Nebraska courts and her claim was also founded on that judgment. It is urged as against this claim that the order of dismissal was proper because at the date upon which the Nebraska judgment was rendered the Illinois Surety Company, by reason of proceedings brought in the State of Illinois, had ceased to exist. The precise question has been passed on, and adversely to appellee's contention, in this and the Supreme court of the State. Evans et al. v. Illinois Surety Co., 298 Ill. 101 and 104.

the judgment of the Supreme court of Illinois, has held that section 2 of that statute is void, as contrary to the Constitution of the United States. Kenney v. Loyal Order of Moose, 40 Supreme Court Reporter 321.

Aside from this, however, we do not think the claim should have been dismissed for the reason that the Injuries Act is by its terms applicable only to causes of action ex delicto, which did not exist at the common law; Grace v. Chicago & Western Indiana R. R. Co., 229 Ill. 298; Prouty v. City of Chicago, 250 Ill. 222; while the action disclosed by the suit brought on the bond was an action ex contractu. Kosch v. Pabtcle, Admr., et al., 141 N. E. 791; Gallagher et al. v. McMahon, 144 N. E. 691; Lehman v. Lehman et al., 129 N. E. 752; Hussey v. Hunt, v. Allied Service Station Co., 21 Ill. 120; Fisher v. Bankers Surety Co. 96 Ill. 401.

Appellee also argues that the Contractor appeal should have been taken to the Supreme court, but this point is obviously without merit. There is therefore no reason why the claim of Hannah Contractor should not have been allowed.

As to the claim of Marguerite Kapp et al., a similar judgment was entered in the Kankakee courts and her claim was also founded on that judgment. It is urged as against this claim that the order of dismissal was proper because at the date upon which the Kankakee judgment was rendered the Illinois Workmen's Compensation, by reason of proceedings brought in the state of Illinois, had ceased to exist. The precise question has been raised on, and adversely to appellants contention, in this and the Supreme court of the State. Kenney v. Illinois Bonds Co., 134 N. E. 101 and 104.

Appellee also contends that neither claim can be enforced in the courts of this state because the proceedings amount to prosecutions for the violation of penal ordinances of the City of Omaha and the penal statutes of the State of Nebraska, citing Wisconsin v. Pelican Insurance Co., 127 U. S. 265. That case, however, is clearly distinguishable from this. The State of Nebraska was not a party to the suits brought in that State.

As to the Rapp claim it is also contended that the first judgment in favor of Mrs. Schroeder exhausted the full penalty named in the bond, and that the Surety Company was not further liable, citing Title Guaranty & Surety Co. v. Shattuck, 224 Fed. 401, and Guffanti v. National Surety Co., 196 N. Y. App. 456. That defense, if valid, should have been presented in the Nebraska courts. The record shows it was not presented and that both judgments are unpaid.

The court should have sustained the exceptions to the master's report and allowed these claims. The orders of dismissal will therefore be reversed and the cause remanded, with directions to allow these claims for the full amount thereof.

REVERSED AND REMANDED WITH DIRECTIONS.

Dever, P. J., and McSurely, J., concur.

No. 19[illegible] 24579
24600

3M 2-18-21

Claims against the estate of a surety on a bond, and of a judgment entered in the [illegible] denied.

222 I.A. C48

ror to the Municipal Court of Chicago;
Superior Court of Cook county;
ppeal from the Circuit Court of county;
County Court of county:
e Hon. , Judge, presiding. Heard
the Branch Appellate Court
this court at the term,
firmed
eversed
eversed and remanded with directions.
pinion filed Rehearing denied

for appellants.

for plaintiffs in error.

for appellees.

for defendants in error.

ESIDING JUSTICE delivered the opinion of the court.

426 - 26600

MARGUERITE RAPP Individually, etc., et al., Appellants, vs. JAMES S. HOPKINS, Receiver, Appellee.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause was consolidated for hearing with number 26599, and the questions involved in this appeal are discussed in an opinion this day filed in that cause.

For the reasons there set forth the order of the Superior court will be reversed and the cause remanded with directions to allow appellants' claim.

REVERSED AND REMANDED WITH DIRECTIONS.

Dever, P. J., and McSurely, J., concur.

467 - 20641

[illegible])
[illegible],
)
vs.
)
[illegible],
[illegible].)

222 I.A. 648

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for plaintiff in an action of forcible detainer. The cause was tried by the court without a jury.

Defendant contended on the trial and as appellant argues here, that he held the premises as a tenant from year to year and that it was therefore necessary for plaintiff to give him a sixty days notice as provided by section 5 of chapter 80, Hurd's Revised Statutes, 1919, page 1861, in order to terminate the tenancy. On the other hand the trial Judge held and plaintiff as appellee here argues that the tenancy was one from month to month and that a thirty day notice, which there was proof had been duly served, as provided for by section 6 of the same chapter, was sufficient. The assignments of error challenge the ruling of the court in this regard.

The facts appear to be that appellant (defendant) leased the premises from Max Solinsky and Sigmund Shuger for a term of three years beginning May 1, 1916, and ending April 30, 1919, by a lease which was in writing and under seal. It provided that the lessee should pay as rent the sum of $1:60 in monthly instalments of $35 each, and further that the lessee

> "will try to rent the premises at 2833 and 2835 West 26nd street whenever necessary, and collect the rent for said buildings free of charge, and turn over said rents when collected to owner of said premises."

While this lease was outstanding the premises were conveyed to one Louis Karno, and the defendant attorned and paid rent to him. Prior to the expiration of the written lease one Glover was appointed the agent of Karno. His uncontradicted evidence is -

> "I recall a conversation before May 1st, 1919, with Mr. Shuflitowski with reference to negotiating a new lease for the year beginning May 1st, 1919, and ending April 30, 1920. I told Mr. Shuflitowski that his rent would be $[illegible] more for the coming year. Mr. Shuflitowski told me that I ought to make it $10.00 per month more, and I said I could easily arrange that matter if it was satisfactory to him. Later on I brought the lease to Mr. Shuflitowski for the ensuing year, I think it was a blank lease, because the tenant had to sign it first. It was never signed by Mr. Shuflitowski to my knowledge. I asked him to sign it. He said he did not get to it yet."

From May, 1919, the defendant paid and the owner accepted $40.00 per month as rent. The plaintiff in this case took a lease in writing from Karno for a term beginning July 1, 1920, and ending April 30, 1925.

Appellant invokes the rule of law that where a tenant holds over after the expiration of a former lease, with notice of increase of rent, if no new bargain as to other terms is made, the tenant becomes a tenant from year to year at the increased rent, and that as to all other matters the terms expressed in the former lease will govern; citing Miller v. Ridgely, 19 Ill. App. 306; Rand v. Purcell, 58 Ill. App. 228; Hinsing v. Hillman, [illegible] Ill. 173; Griffin v. Knisely, 75 Ill. 411. The rule contended for is not, we think, applicable to the facts of this case.

Where a tenant for years under a written lease holds over after the expiration of his term, in the absence of other agreement the landlord may, at his election, treat him as a trespasser or tenant for another year at the same rental; or when the tenant holds over with the agreement that a different rent will be paid, in the absence of any other or different agreement the terms

of the former lease will generally control except as to the amount of rent to be paid. But where, as here, negotiations are pending with the landlord at the expiration of the lease for another lease on different terms, or where an oral lease is agreed to between the parties, which lease is void by reason of the Statute of Frauds, it has been held that the tenancy created is one from month to month.

The uncontradicted evidence here shows that it was not the intention of the parties that the old lease should be continued with all its provisions except as to the amount of rent. On the contrary the parties were negotiating a new lease at an advanced rental, and with other and different terms from those contained in the original lease. Such a lease was prepared but never signed.

Under the facts we think the trial court might consistently find either that there was a new oral lease for a term longer than one year, which would make it void under the Statute of Frauds, or that defendant held over, pending negotiations for a new lease, which was never in fact made. The rent was paid monthly, and in either case we think the trial court was justified in finding that the tenancy created was one from month to month.

The thirty day notice, which it is admitted was duly served, was therefore sufficient to terminate the tenancy. Johnson v. Foreman, 40 Ill. App. 456; Madlung v. Jackson, 172 Ill. App. 60; Brownell v. Welch, 91 Ill. 323; Weber v. Bowers, 213 Ill., 370.

The judgment will be affirmed.

Affirmed.

Never, P. J., and McBurney, J., concur.

474 - 26659

JOHN ELIOPULLOS and
GEORGE ELIOPULLOS,
Appellants,

vs.

SHER-LAK HOTEL COMPANY
and GEORGE H. BISSINGER,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

222 I.A. 648

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree which dissolved a temporary injunction theretofore granted and dismissed complainants' bill for want of equity. The cause was heard upon exceptions to the report of the master in chancery, to whom it had theretofore been referred.

The material facts appear to be that one Kusel was the owner of a ninety-nine year lease of the premises described in the bill of complaint, which constituted the northeast corner of Sheridan Road and Eastwood Avenue, Sheridan Road being a public street extending north and south, while Eastwood Avenue is a public street extending east and west. The lease covered two lots and that part of the lots fronting on Sheridan Road was known as numbers 4635 to 4645, while that part fronting on Eastwood Avenue was known as numbers 944 to 954. In the fall of 1915 Kusel began erection of improvements on these premises. It is clear his intention was to erect two buildings, one facing on Sheridan Road, the other facing Eastwood Avenue. The improvement facing on Sheridan Road was planned as a three story structure, designed for stores on the street floor and a general hotel in the two upper floors. The Eastwood avenue improvement was designed as a three story structure with English basement, and was intended to be used as a bachelors' hotel. August 17, 1915, Kusel applied for separate permits for the erection of these

improvements, and such permits to erect the same were issued by the City of Chicago on August 21st and 27th respectively. October 14th, while the improvements were only partially erected, the lease under which complainants claim was executed. The premises leased are therein described as third store from the corner of Eastwood and Sheridan Road, known and designated as #4639 Sheridan Road, and rear of store at 4641 Sheridan Road, City of Chicago, to be occupied as a restaurant and for no other purpose from March 1st, 1916, to February 28th, 1921, having a rental of $7,500.00, payable in installments of $125.00 each. By a rider attached to this lease it is provided "that since the premises are at the date hereof, not completed, and are in the course of construction, the failure of the lessor to have the said premises ready for occupancy on said March 1st, 1916, shall not in any manner affect said lease, but said lessor shall have the right to tender said premises at any time said lessor deems the same ready for occupancy * * * *;" by another provision, "It is further agreed that the lessee shall have the exclusive right to conduct a restaurant in this building."

December 9, 1915, Kusel executed a lease (under which the defendant Hotel occupies) to John P. Baldwin for a term of ten years beginning February 1, 1916. In this lease the premises demised are described as "the entire building now in process of erection, to be known by street number, when completed, as 944 to 946 Eastwood Avenue, and the second and third floors of the building, now in process of erection, to be known, when completed, by street numbers 4635 to 4645 Sheridan Road, Chicago, Illinois, together with office on the first floor of the last described building * * *," This hotel office was located in the front part of 4641 Sheridan Road, the rear part of

which store was used by complainants and their predecessors in title as a kitchen for their restaurant.

The hotel entrance and corridor were between the restaurant and the hotel office, and doors were put in leading from the corridor into the office of the hotel and the restaurant respectively.

After the execution of the lease to Baldwin, one of the defendant hotel company's predecessors in title, openings were cut in the partition wall between the two buildings. Single openings were made in the wall on the second and third floors of the Sheridan Road improvement and stairways of six or seven steps were built, by which the occupants might descend from the Sheridan Road building to the first and second floors of the Eastwood Avenue building.

At the time of the execution of complainant's lease the Eastwood avenue improvement had been constructed up to the third story walls and the workmen were setting the second floor joists of the Sheridan Road improvement. Bais, the original lessee, and complainants' predecessor in title, went to the office of the renting agent, who had sketches of the stores only. He informed the agent that he desired a store next to the hotel entrance. A friend who accompanied Bais urged him to make the lease on the ground that he would have hotel guests for customers, and the agent told him that a hotel and stores would be located in the building. They examined both buildings, which were evidently designed for hotels, but apparently not planned for the purpose of serving meals, and were to be what is known as European hotels.

The answer of the dfendant Hotel Company admits that it proposes to conduct a restaurant in the building fronting on Eastwood Avenue, and claims the right so to do.

The questions to be decided are whether the proposed

restaurant to be conducted on these premises occupied by the Hotel Company will violate the restrictive covenant in the lease under which the complainants claim and, if it does, whether such violation may be lawfully enjoined.

The master finds that the defendants hold with notice and knowledge of complainants' rights under that covenant, and we think that finding is sustained by the evidence. We think, too, the covenant in the lease under which complainants claim is a reasonable one, which will be enforced by the courts by means of an injunction where defendants have such notice and knowledge as appear here.

Appellees contend that a strict rule of construction against the covenant, as in derogation of common right, should be applied, and that if the court is in doubt the supposed rights of complainants should be denied; while appellants contend that a liberal rule of construction in favor of the covenant should be adopted. Decisions are cited apparently in conflict, but we think our conclusion would not be different whether we sustain the contention of the one party or the other in this respect.

Conceding all other contentions of the complainants, we are nevertheless of the opinion that the decree was proper, for the reason that giving the covenant of the complainants' lease the most liberal construction reasonable, and considering all the facts and circumstances at the time the lease was made, and the situation of the parties, it seems clear that lessor and lessee must have regarded the improvements then being constructed on these premises as two separate and distinct buildings. If so, then lessor and lessee must have intended that the restrictive covenant should apply alone to the Sheridan Road building, which was the one demised in the lease. Such it seems to us is the plain mean-

ing of the phrase "in this building." That the lessor must have so regarded it is apparent from the facts that separate designs were made for these improvements, separate permits to build them taken out and separate contracts for the construction thereof entered into. That Bais, the original lessor and complainants' predecessor in title, must have been aware of the fact that the improvements would constitute two separate buildings is apparent when we consider that at the time the lease was executed the improvement fronting on Eastwood Avenue was up three stories; that the joists were then being set on the second floor of the building fronting on Sheridan Road, and that the buildings were not at that time connected; that the style of architecture, the color, the height, the floor levels of the two improvements were entirely different; that each had its separate entrances and exits; that in the rear the buildings were separated by a ten foot court and in front by two twelve inch brick walls. All these things were apparent to Bais at the time the lease was executed and they amounted to notice to him that if it was the intention to have the restrictive covenant cover both buildings, language appropriate to that purpose should be used. If the improvements as originally made constituted two buildings, then we think the changes made in the use and structure would not change them into one, even if that fact could be considered as material. The changes in structure were slight; the changes in use were, we think, wholly immaterial. Whether a given improvement constitutes one or more buildings, we think depends on the construction thereof rather than the ownership or use of it. Houghton v. Moore, 141 Mass. 437; Fortesque v. Carroll, 76 N. J. Equity 583.

We think the covenant in complainants' lease is

valid but that it cannot be construed to cover premises where the proposed restaurant is to be located. The courts have the power to construe but not to make contracts for litigants.

The decree is affirmed.

AFFIRMED.

Dever, P. J., and McSurely, J., concur.

valid but that it cannot be construed to cover premises where the proposed restaurant is to be located. The courts have the power to construe but not to make constructs for litigants.

The decree is affirmed.

AFFIRMED.

Dover, P. J., and Morrely, J., concur.

1[illegible] - 2[illegible]

[illegible]

[illegible]

vs.

THE NORTHERN TRUST COMPANY,
Trustee under the will of
[illegible], deceased,
and Trustee under the several
Deeds of Trust executed by
[illegible],

Appellant,

[illegible],
Appellees.

[illegible] COURT OF COOK COUNTY.

222 I.A. 649

[illegible]

DELIVERED THE OPINION OF THE COURT.

September 5, 19[illegible]1, the Chancery court of Cook County entered a decree in which it directed the Northern Trust Company, a corporation, to distribute certain trust funds in its hands in accordance with the directions of a decree entered July 6, 1921, in the Circuit Court of Cook County in a suit entitled Northern Trust Company et al. v. Sargent et al.

The decree of July 6, 1921, approved the account of the Northern Trust Company, trustee, and ordered a distribution of the funds to Evelyn Florence Hardridge, May Aleen Hardridge Sargent, Albert J. Hardridge, Harriet Hardridge and Virginia Hardridge Schoellkopf. The trustee refused to comply with the directions of the decree of July 6, 1921, for the reason, as it asserts, that the trustee was not protected thereby in that one party thereto was served with notice of the suit by publication and mailing of notice, and that certain other defendants in the proceedings which culminated in the decree of July 6, 19[illegible]1,

had an interest adverse to that of the trustee and were entitled under the statute to sue out a writ of error to reverse it. Further reason given for the failure of the trustee to comply with the decree of July 8, 1921, is that it was based in part upon a decree of the Circuit court of Cook County entered February 26, 1919, in the case of Northern Trust Company, Trustee, v. Albert S. Pardridge et al; that on the 14th day of January, 1920, a writ of error was sued out of this court to reverse the decree of February 26, 1919; that this writ of error suit is still pending in this court and that cross errors have been filed therein by infant defendants by their guardian ad litem.

All of the parties interested in the funds in the hands of the trustee appeared or were personally served by summons or by copy of the bill in the suit which terminated in the decree entered September 8, 1921. The trustee has appealed from this decree to this court for the purpose, as appears by the brief of counsel, "to give all parties an opportunity on appeal in this court to make their contentions, to the end that they might be precluded from hereafter suing out a writ of error at a later time to reverse the decree of September 8, 1921." All of the parties to the proceedings below, except certain minors, defendants, insist in this court that the decree should be affirmed, and this seems to be the position taken by the Northern Trust Company, which appears here as appellant. A guardian ad litem appointed by this court for infant defendants, however, calls our attention to the fact that the decree of July 8, 1921, the provisions of which the trustee is ordered to comply with by the terms of the decree appealed from, is in part based upon the decree entered by the Circuit court on February 26, 1919, and that a writ of error to reverse the latter decree is pending in this court.

It appears from the briefs filed that plaintiffs in error in the writ of error suit have entered into a stipulation providing for the dismissal of the writ of error suit pending in this court, and the guardian ad litem admits in his brief that if the plaintiffs in error in that proceeding move to dismiss their writ of error such motion will cause its dismissal, including cross errors filed therein on behalf of the infant defendants, and in that event the status of the present appeal and the parties thereto will be the same as though no writ of error were pending.

It seems to be conceded that the writ of error was not made a supersedeas by an order of this court and that an affirmance of the decree of September 2, 1921, would have the effect of putting an end to the entire proceedings. For the infant defendants it is said by their guardian that the affirmance of the decree now before us will merely prevent such defendants from proceeding at some future date against the trustee if it should distribute the funds in accordance with the decree of July 2, 1921, and that such infant defendants would only be permitted to pursue the trust estate in the hands of distributees. We agree with this contention and it is our opinion that under the authority of the case of Chapman et al. v. Northern Trust Co., 296 Ill. 334, the trustee is required to pay over the funds in its hands to distributees named in the decree in accordance with its directions. Then under section 19 of the Chancery Act defendants served by publication in a suit seek to set aside a decree directing a distribution, the trustee will be protected after distribution made in accordance with the terms of the decree.

In its opinion in the Chapman case the Supreme Court said:

> "The party served by publication is not deprived of any right which he had before. The court has ordered the custody of the property to be handed over to a distributee, but the non-resident has the same right to follow the property into the distributee's hands as he had to follow it into the hands of the court or trustee. The right has been changed from one against the trustee to one against the distributee. The decision of the English courts of chancery protecting the trustee where distribution was decreed in the absence of parties was a doctrine that was recognized long before our constitutions were adopted, and therefore following these rules is not taking property without due process of law, contrary to our constitution."

It is conceded by everybody who appears in the present proceedings that the instant case is governed by the decision of the Chapman case supra, except that the guardian for the infant defendants suggests to us the pendency of the writ of error suit.

The pendency of the writ of error suit to reverse the decree of February 26, 1919, in view of what appears by the briefs of counsel, both for the infant defendants and appellees, must be regarded as a moot question. The parties who sued out the writ of error are the same persons who appear here and ask for an affirmance of the decree appealed from; they appear as complainants in the suit which resulted in the decree of September 8, 1921, and they sought in the proceedings below a compliance on the part of the trustee with the decree of July 8, 1921, which ordered a distribution of the funds. These facts taken in connection with the statement made in this proceeding on behalf of plaintiffs in error in the suit to reverse the decree of February 26, 1919, that they have entered into a stipulation to dismiss the writ of error suit on affirmance of the decree of September 8, 1921, actually, if not technically, puts an end to the writ of error proceedings.

The decree of the Superior court is affirmed.

[illegible].

McBurney and Batchelor, JJ., concur.

206 - 26379

N. H. KERN,
Appellee,

vs.

DIAMOND GLUE COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 649

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a physician and surgeon, commenced an action in the Municipal Court of Chicago against defendant to recover the sum of $294, for professional services rendered from May 26, 1918 to August 5, 1918, to George Callahan, an employee of defendant, under an oral contract. Callahan had been injured while working in defendant's factory. In its affidavit of merits defendant stated that it had employed plaintiff to render medical services to said Callahan only to the extent to which defendant was obligated so to do under the Workmen's Compensation Act and that it had not promised or agreed to pay plaintiff for any other services. On the trial without a jury, the court found the issues against the defendant, assessed plaintiff's damages at the sum of $294, and entered judgment against the defendant for that amount.

It appears that Callahan was injured on the evening of May 25, 1918; that plaintiff was telephoned for; that early in the morning of May 26th he removed Callahan to a hospital in Chicago and at once performed an operation on the latter's injured arm and on June 3rd performed another operation; that up to and including June 4th he had performed services to the value of $225; that subsequently and up to and including August 5th he continued from time to time to treat Callahan and made an additional charge therefor of $69; and that at the time Callahan was injured the defendant was engaged in a business coming within

Ill. Personal injury actions and damage or loss: Court.

Plaintiff, a physician and surgeon, commenced an action in the Municipal Court of Chicago against defendant to recover the sum of $264, for professional services rendered from May 26, 1919 to August 8, 1919, to George Gallaher, an employee of defendant, while at real receipts. Gallaher had been injured while working in defendant's factory. In its affidavit of merits defendant stated that it had employed plaintiff to render medical services to aid Gallaher only to the extent to which defendant was obligated so to do under the workmen's compensation act and that it had not previous an agreed to pay plaintiff for any other services. On the trial without a jury, the court found the issues against the defendant, assessed plaintiff's damages at the sum of $264, and entered judgment against the defendant for that amount.

It appears that Gallaher was injured on the evening of May 26, 1919; that plaintiff was telephoned for; that early in the morning of May 27th he removed Gallaher to a hospital in Chicago and at home performed an operation on the injured's injured arm and on June 3rd performed another operation; that up to and including June 12th he had professional attendance on the injured of $264; that subsequently and up to and including August 8th he continued from time to time to treat Gallaher and made an additional charge therefor of $20; and that at the time Gallaher

the terms of the Workmen's Compensation Act of Illinois then in force and Callahan was also subject to the provisions of said act. In paragraph A of section 8 of said Act (Hurd's Stat. 1917, Chap. 48, Sec. 133) it is provided in part that -

> "The employer shall provide necessary first aid, medical, surgical and hospital services; also medical, surgical and hospital services for a period not longer than eight weeks, not to exceed, however, the amount of $200."

Plaintiff testified that on May 26th, after he had removed Callahan to the hospital and had performed the first operation, he went to defendant's plant and had a conversation with Mr. Deutsch, manager of said plant; that Deutsch then told him that he should not spare any expense, but give Callahan the best of care and endeavor to save his arm, and that defendant would pay the bill; and that at no subsequent time did Deutsch tell him (plaintiff) not to render further services to Callahan. Deutsch testified on defendant's behalf that in the conversation he had with plaintiff the latter seemed anxious as regards getting pay for his services; that he (Deutsch) told plaintiff not to be afraid but to do everything possible for Callahan; that he did not say anything to plaintiff as to how long he was to treat Callahan; and that he did not tell plaintiff that defendant would pay plaintiff's bill, but on the contrary stated that defendant carried liability insurance.

The principal ground relied upon for a reversal of the judgment is that the trial court erred in refusing to admit certain evidence. Defendant offered to prove by certain questions asked of a witness, and by certain letters and documents offered in evidence but not admitted, that at the time of the accident, and long prior thereto, defendant carried liability insurance with a certain insurance company to whom it had reported all accidents which had occurred in its plant; that said insurance company after receiving notice had taken entire charge of the

the terms of the workmen's Compensation Act of Illinois then in force and Gallahan was also subject to the provisions of said act. In paragraph 4 of section 8 of said Act (Bush's Stat. 1917, Chap. 48, Sec. 138) it is provided in part that -

> "The employer shall provide necessary first aid, medical, surgical and hospital services; also nursing, surgical and hospital service for a period not longer than eight weeks, but in excess, however, of the amount of $100."

Plaintiff testified that on May 28th, after he had removed Gallahan to the hospital and had performed the first operation, he went to defendant's plant and had a conversation with Mr. Lewtson, manager of said plant; that Lewtson then told him that he should not spare any expense, but give Gallahan the best of care and endeavor to save his arm, and that defendant would pay the bill; and that in the afternoon (Mr. Lewtson tell him (plaintiff) not to render further surgical to Gallahan, because instructed by defendant's herein that in the conversation he had with relatives the latter would pay for medical attention pay for his services; that he (Lewtson) told plaintiff not to be afraid but to do everything possible for Gallahan; that he did not say anything to plaintiff as to how long he was to render treatment; and that he did not tell plaintiff he was to stop treatment when Gallahan would pay plaintiff's bill, but on the contrary stated that defendant carried liability insurance.

The principal ground relied upon for a reversal of the judgment is that the trial court erred in striking in small part the testimony of a witness. Defendant offered to prove by direct examination of a witness, and by certain intervening and demonstrative evidence in evidence but not admitted, that in the time of the accident, and long prior thereto, defendant carried liability insurance with a certain insurance company to cover it in a certain business which had occurred in the plant; that said insurance company after completely taking the place of the - [illegible]

matters involved, and after giving notice defendant took no further action as regards handling the medical cases; that on May 28, 1918, defendant sent a written report to said insurance company, giving full details of the accident and advising said company that Callahan had received medical attention from plaintiff at said hospital; that on June 4, 1918, plaintiff received a letter, dated June 3rd, from said insurance company, in which it stated that it was the insurer of defendant in the Callahan case and that it had been advised that plaintiff was treating Callahan, and in which it further stated: "You will please understand that the case is to be dealt with as per the provisions of the Workmen's Compensation Act; you are no doubt familiar with the medical provisions in the Act and shall be governed thereby; if injured is likely to suffer disability of over one week we shall appreciate if it you will at earliest opportunity furnish us a written report on the case by use of the enclosed form"; that on June 5, 1918, plaintiff made out a full report of the Callahan case on the form, and signed and sent the same to the insurance company; and that in the policy which had been issued by said insurance company to the defendant, and which was in force at the time of the accident, it was provided that said insurance company should "pay the compensation and furnish the medical, surgical and hospital services and medicine," provided in said Workmen's Compensation Act, "on behalf of the assured, to any person or persons to whom such compensation shall become due for or on account of personal injuries."

We are of the opinion that the court erred in refusing to admit the offered evidence. Taken in connection with the testimony admitted in evidence, particularly that of defendant's witness, Deutsch, and keeping in mind the provisions of the section of the Workmen's Compensation Act above mentioned, the offered evidence tended to prove, we think, that defendant under

its verbal arrangement with plaintiff was not itself liable to plaintiff to a greater amount than $200. And we think it clearly tended to prove that defendant's liability to plaintiff could not in any view of the case be greater than $225, which was the value of plaintiff's services rendered prior to the receipt by him of the letter of the insurance company above mentioned, which directed his attention to the provisions of the Workmen's Compensation Act regarding medical services, advised him that the insurance company was the insurer of the defendant in the Callahan case and requested him to make a full report as to Callahan's injuries and condition. Plaintiff, by making the report requested, seemingly recognized the authority of the insurance company to act in the future for the defendant. It does not appear that plaintiff made any agreement with anyone regarding future services after the receipt of said letter from the insurance company, but it does appear that he continued from time to time thereafter to treat Callahan even after the eight weeks period mentioned in said Act had expired.

For the error of the trial court in refusing to admit the evidence offered the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes and Morrill, JJ., concur.

305 - 26479

SABATH DESK CO., a corporation,

Appellant,

v.

ABE BURNETT,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

222 I.A. 649

MR. PRESIDING JUSTICE BARNEY DELIVERED THE OPINION OF THE COURT.

On March 29, 1920, plaintiff commenced an action in replevin against the defendant, Burnett, in the Municipal Court of Chicago, claiming the right to the possession to certain enumerated office furniture, which under the writ the bailiff took from Burnett's office at Room No. 100 in the Exchange building at the Union Stock Yards, Chicago, and on the same day turned over to plaintiff, taking its receipt therefor. On the trial before the court without a jury plaintiff's only witness was Rudolph Sabath, president of plaintiff. At the conclusion of plaintiff's evidence the court, not desiring to hear any witnesses for the defendant, found that the right to the possession of the property was not in the plaintiff and adjudged that the defendant recover its possession and that a writ of retorno habendo issue. Plaintiff by this appeal seeks to reverse the judgment.

Plaintiff, in its bill of particulars which it filed on defendant's motion, alleged in substance that it agreed to sell and one Charles F. Miller agreed to buy the furniture at the price of $862.85; that Miller agreed to pay said sum upon the delivery thereof; that plaintiff delivered it to Miller "and placed same in the premises of the defendant, Abe Burnett"; and that Miller has failed and refused to pay for the same.

Plaintiff's witness, Sabath, testified in substance that plaintiff frequently had had business relations with Miller;

that the latter called on the witness and ordered the furniture at which time he made a deposit in part payment thereof and told the witness that as soon as it was delivered he would give him a check in full payment; that all of the furniture was delivered in plaintiff's truck to said office in four separate deliveries, the first delivery being on January 7, 1920, and the last on January 9, 1920 (i.e. about 80 days before this replevin action was commenced); that at the time of one of these deliveries an invoice or bill was delivered but at which he did not know; that plaintiff sent statements of indebtedness in the usual form to Miller at said office on January 30th, February 3rd, February 21st and March 9th, 1920, but that no payments were made; that the witness had a conversation with Burnett in said office on the day before the furniture was replevied, before which time he had never talked with Burnett about the furniture; that at that time he saw the name "A. Burnett & Co." on the office door; and that Miller's name was never on said door to his knowledge.

It clearly appears from the evidence, we think, that the sale of the furniture was made to Miller on credit, that it was not a sale "C. O. D." and that plaintiff had parted with the title to the furniture. There was no proof that when the driver of plaintiff's truck delivered the furniture at the different times he had any order from plaintiff to collect any monies or that he made any demand therefor. On the other hand it appears that he delivered the goods and that later plaintiff on several occasions sent bills or statements to Miller. Counsel for plaintiff, in support of their contention that the finding and judgment of the trial court were erroneous, cite the case of Wells v. Merle & Heaney Mfg. Co., 66 Ill. App. 292, 296, where it is stated, quoting from Canadian Bank v. McCrea, 106 Ill. 281, 298, that "Where

that the Indian settled on the wharves and received the furniture at which time he made a deposit in part payment thereof and told the storekeeper that he would be back in a few days to complete the purchase by full payment; that all of the furniture was delivered to plaintiff's street in pursuance of the contract; that on the following Monday, January 7, 1880, and the last on January 9, 1880 (i.e. about 60 days before this action was begun) another representative of the firm of Lewis Brothers and Co. came to the store of defendant with a bill for the furniture and demanded payment; that defendant had at the time of the purchase made no statement to plaintiff concerning his ability or inability to pay for the furniture; that defendant's agent told the representative of Lewis Brothers and Co. that defendant was not able to pay for the furniture; that the agent did not know the name "G. Bennett & Co." on the sign; that the plaintiff had never heard of such a firm in the trade.

In clearly stating the evidence, we think, that the sale of the furniture was made to William as agent, that it was not a sale "G. B. & C." and that plaintiff had parted with the title to the furniture. There was no proof that when the driver of plaintiff's truck delivered the furniture at the different times he had any order from plaintiff to collect any money or that he made any demand therefor. In the other hand it appears that he delivered the goods and that Adam plaintiff on several occasions went with William to deliver to William. Counsel for plaintiff, in support of their contention that the finding and judgment of the trial court were erroneous, cite the case of Jaffe v. Marie & Lamar Ptr. 5 Ill. App. 488, 489, where it is stated, citing Chicago Dancing Assn v. Jordan, 104 Ill. 602, 298, that "where

personal property, other than commercial paper, is by contract sold for cash, to be paid for on delivery, the delivery and payment are to be concurrent acts, and therefore, if the goods are put into possession of the buyer, in expectation that he will immediately pay the price, and he does not do it, the seller is at liberty to regard the delivery as conditional, and may at once reclaim the goods." This principle of law clearly cannot be applied to the present case under the facts in evidence. And we think that the finding and judgment of the trial court were correct for another reason. It was not shown that any demand for the return of the furniture was made on the defendant, Burnett, before the replevin action against him was commenced. "Where a party obtains the possession of property lawfully, an action of replevin cannot be maintained to recover it until a demand has been made and the possession refused." (Ohio & Mississippi Ry. Co. v. Moe, 77 Ill. 513, 514.) It appears that the furniture was originally placed in the premises of Burnett and that he was in possession of the same when the replevin action was commenced. It is to be presumed that his possession was lawful and plaintiff's evidence was not to the contrary. (Rosenbaum v. King, 114 Ill. App. 648,651.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

BARNES and MORRILL, JJ., concur.

personal property, other than commercial paper, is by contract sold for cash, to be paid for on delivery, the delivery and payment are to be concurrent acts, or dependent, if the goods are put into possession of the buyer, in anticipation that he will immediately pay the price, and he does not do it, the seller is at liberty to repeat the delivery or cancellation, and may at once resale the goods." This principle of law clearly cannot be applied to the present case under the facts in evidence. And as stated that the finding and judgment of the trial court were correct for another reason. It was not shown that any demand for the return of the chattels was made on the defendant, however, before the replevin action against him was commenced. "Where a party obtains the possession of property lawfully, an action of replevin cannot be maintained to recover it until a demand has been made and the possession refused." (Duke v. Hildebrand, 57 Ill. App. 77 (1st. Dist. 1894)) It appears that the Plaintiffs had repossessed the property in the premises of Bennett and that he was in possession of the goods when the replevin action was commenced. It is to be presumed that the presumption was (illegible) and (illegible) at the time of the replevin. (Lemmons v. Lane, 126 Ill. App. 662,664; 1906)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

BURKE and MCCUTCHEN, JJ., concur.

335 - 26509

PEOPLE OF THE STATE OF ILLINOIS ex rel. VALEY TOBARKIEWICZ,

Appellee,

vs.

WALTER KUS,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 649

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On December 22, 1919, Valey Tobarkiewicz filed her sworn complaint in the Municipal Court of Chicago under the Bastardy Act, alleging that on May 11, 1919, she was delivered of a male child in the City of Chicago, that at that time she was and still is an unmarried woman, and that Walter Kus was the father of the child. The defendant was arrested and gave bond for his appearance. The cause was placed on the criminal calendar of the court for trial. The proceeding, however, is a civil one. (McCoy v. People, 71 Ill., 111, 114; Hawlings v. People, 102 Ill., 475, 478.) On January 27, 1920, the defendant having waived a jury trial, the court found him guilty as charged in the complaint, and adjudged that he was the father of the bastard child and that defendant pay to the clerk of the court, for the support and education of the child, the sum of $550, in installments. The defendant prayed an appeal and filed his appeal bond. He was given 60 days within which to file a bill of exceptions, and on March 22, 1920, within the required time, he presented a bill of exceptions and the trial judge marked the same "presented." The bill of exceptions was, however, not signed until September 21, 1920, when an order was entered approving the same and directing it

to be filed nunc pro tunc as of March 22, 1920.

On direct examination, the complaining witness, giving her name as Valeria Tubakrowicz, testified in substance that she was married on May 10, 1919, but was now single; that the baby boy was born in Chicago on May 11, 1919, one day after her marriage, and was now in her care and custody; that the defendant, Walter Kus, was the father of the child; that she had sexual intercourse with him on August 16, August 17, and August 20, 1918; that on August 20, 1918, she told him he would become a father and he told her to leave everything to him; and that afterwards he went away and she did not see him again until he appeared in court. On cross examination and in response to questions asked by the trial judge, she further testified in substance that she was married to Casimir Naske by a priest in St. Casimir's church in Chicago on May 1?, 1919; that Naske's mother suggested that he marry the witness; that all went to the office of the county clerk and a license was procured; that at that time Naske's mother stated that he was 21 years of age; that Naske, when he married her knew that she was pregnant and that "he said that he was satisfied with me"; that after the marriage she and Naske went home and he stayed with her for one day but did not cohabit with her; that after the child was born he left her and did not thereafter return; that the child was given the name of Casimir Naske; and that subsequently her marriage to Naske was annulled before one of the judges of the Superior Court of Cook County. The attorney for defendant objected to her testimony that said marriage had been annulled as not being the best evidence and that the record of the annulment should be produced. The court overruled the objection.

The complaining witness was the only witness in her behalf, and at the conclusion of her testimony defendant's

to be filed upon her plea on or about [illegible], 1930.

In Henry County, the municipal officer, giving her name as Lillian Blackwell, testified in substance that she was married on May 16, 1920, but was now alleging that the baby boy was born in Chicago on May 12, 1921, one day after her marriage, and was born in her own home; that the defendant, Walter Lee, was the father of the child; that she had sexual intercourse with him on August 16, August 17, and August 18, 1920; that on August 2, 1921, he told him he would become a father and he held her to leave everything to him; and that afterwards he went away and she did not see him again until he appeared in court. On cross examination and in response to questions asked by the trial judge, she further testified in substance that she was married to Dominic Moke by a priest in St. Dominic's Church in Chicago on May 16, 1920; that Dominic's mother suggested that he marry the witness; that all went to the office of the county clerk and a license was procured; that at that time Dominic's mother stated that he was 23 years of age; that Moke, when he married her knew that she was pregnant and that "he said that he was satisfied with me"; that after she married the and Moke went home and he stayed with her for one day but did not cohabit with her; that after the child was born he left her and did not thereafter return; that the child was given the name of Dominic Moke; and that subsequently her relatives in Illinois had filed a bastardy proceeding in Illinois and that before one of the judges of the Superior Court of Cook County. The attorney for defendant objected to her testimony that said marriage had been annulled on ground the best evidence and that the record of the proceedings should be produced. The court sustained the objection.

The complaining witness was the only witness in her behalf, and at the termination of her testimony defendant's

attorney moved for a finding in his favor on the ground that on the day the child was born she was a married woman, and that no annulment of the marriage had been properly proven. The position taken by opposing counsel was that the marriage, having been annulled, was void ab initio, and that, hence, on the day the child was born and on the day when the complaining witness filed the complaint, she was an unmarried woman. The motion of defendant's attorney was denied and he was directed to proceed with the defense.

Walter Kus, the defendant, testified in substance that he lived at 2540 N. Whipple street, Chicago, and had lived there continuously since August, 1918, and prior thereto; that he had known the complaining witness for about two years; that he had once in July, 1919, taken her out to a dancing party; that he had never had sexual intercourse with her; and that she had never told him that she was pregnant or that he was the father of the child. Alice Kallis testified in substance that several months before the child was born she and the complaining witness were working for the same manufacturing establishment in Chicago; that on one occasion the latter said that she was in a family way and that Kaske was the father of the unborn child; and that at another conversation had after the child was born the complaining witness had told her that she never had had intercourse with the defendant. Theresa Kallis, sister-in-law of Alice Kallis, testified in substance that about three months after the child was born the complaining witness told her that she had had trouble with her husband because of the birth of the child, but that the defendant had "never touched her" and that she had "had nothing to do with anybody but Kaske." The complaining witness denied making the statements mentioned to either Alice or Theresa Kallis.

attorney moved for a finding in his favor on the ground that on the day the child was born she was a married woman, and that in accordance of the authorities that have previously spoken. The plaintiff claims by appellant counsel was just the contrary, having been married, was with <u>in fact</u>, and that, hence, on the day the child was born and on the day when the complaining witness filed the complaint, she was an unmarried woman. The motion of defendant's attorney was denied and he was allowed to proceed with his defense.

Matter has, the defendant, testified in substance that he lived at 2[illegible] S. Ashgrove street, Chicago, and had lived there continuously since August, 1917, and prior thereto; that he had known the complainant witness for about two years; that he had seen in July, 1918, taken her out to a dancing party; that he had never had sexual intercourse with her; and that she had never told him that she was pregnant or that he was the father of the child. Claim Smith testified in substance that several months before the child was born she had the complaining witness work for the same manufacturing concern in Chicago; that on one occasion the latter said that she was in a family way; and that Frank was the father of the unborn child; and that at another conversation had after the child was born the complaining witness had told her that a the father had intercourse with the defendant. Therese Smith, sister-in-law of John Smith, testified in substance that about three months after the child was born the complaining witness told her that she had intercourse with her brother-in-law, John Smith, that the defendant had "never touched her" and that she had refused to do with anybody but Frank. The complaining witness testified making the statements mentioned to sister-in-law as

Counsel for defendant contends that the finding and judgment are against the law and the weight of the evidence.

In the case of People v. Volkedorf, 112 Ill., 292, the construction of the first section of the Bastardy Act was involved, and the court said (p.295): "The statute authorizes the making of the complaint when a single woman is pregnant with child. In that case the complainant must be 'unmarried' at the time of making the complaint. It also authorizes the institution of the prosecution when an unmarried woman has been delivered of a child, in which case it is not necessary that she be unmarried when she makes the complaint. * * The true construction of the statute is, that the mother shall be unmarried at the time the child is born, and the word 'unmarried', in the law, does not properly relate to the time of making the complaint." In other cases, also, it has been held that where, as here, the complaint is made after delivery the mother must be unmarried when the child is born. (Almincwicz v. People, 117 Ill. App., 415, 417; People v. Griffin, 142 Ill. App., 588, 592.) In the present case the complaining witness testified that on the day before the child was born she was married to one Casimir Waske; and she was allowed to testify, over objection, that said marriage was subsequently annulled before one of the judges of the Superior Court. If the marriage was annulled by a decree of a court, that fact was not proved by proper evidence. And in our opinion it was not shown by a preponderance of the evidence that the defendant was the father of the child. We think that under the circumstances there should be a new trial of the case.

Counsel for defendant also contends that there is a

Counsel for defendant contends that the finding and judgment are against the law and the weight of the evidence.

In the case of Jarvis v. Hightower, 119 Ill., 307, the construction of the first section of the Ancillary Act was involved, and the court said (p.309): "The statute authorizes the filing of the complaint when a single issue is presented with child. In that case the complainant must be 'unmarried' at the time of making the complaint. It also authorizes the institution of the prosecution when a married woman has been delivered of a child, in which case it is not necessary that she be unmarried when she makes the complaint. * * The true construction of the statute is, that the mother shall be married at the time the child is born, and the word 'unmarried', in the law, does not properly relate to the time of making the complaint." In other words, if she has been married, as here, the complaint in made after delivery she neither must be unmarried when the child is born. (Schneiderwin v. People, 137 Ill. App., 418, 419; Brown v. Brown, 147 Ill. App., 324, 328.) In the present case the complaining witness testified that on the day before the child was born she was married to one Dwight Hamm; and she was allowed to testify, over objection, that said marriage was subsequently annulled before one of the judges of the superior Court. If the marriage was annulled by a decree of a court, that fact was not proved by proper evidence, and in our opinion it was not shown by a preponderance of the evidence that she defendant was the father of the child. We think that under the circumstances there should be a new trial of the case.

Counsel for defendant also contends that there is a

variance between the complaint and the proof in that in the complaint the name is "Valey Yobarkiewicz" while on the stand complainant gave her name as "Valaria Yobakrewicz." There is no material variance. "Valey" is probably an abbreviation of "Valaria" and the difference in some of the letters in the surname may have been caused by faulty transcribing.

For the reasons indicated the judgment of the Municipal Court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Barnes and Morrill, JJ., concur.

371 - 26545

FREDERICK W. FRUHEL, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
FRED G. LOEHMAN, Appellant.	)	OF CHICAGO.

222 I.A. 649

MR. PRESIDING JUSTICE BAILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $325 rendered in the Municipal Court of Chicago against the defendant, Loehman, after a verdict of a jury, in an action to recover certain rent alleged to be due.

In his amended statement of claim plaintiff alleged that rent was due him for the west store of the premises, 4216-18 Lawrence avenue, Chicago, for the months from May 15, 1918, up to and including October 15, 1918, and for the months of April, May, June, July and August, 1919, at the rate of $25 per month. The defense was that defendant did not agree to pay any rent for the premises for said months and that he was not indebted to plaintiff in any sum.

It is undisputed that from May 15, 1917 to May 15, 1918, defendant occupied the premises as plaintiff's tenant under a written lease and at a rental of $25 per month, which was paid. Plaintiff was the only witness called in his behalf. His testimony tended to show that about the time of the expiration of said written lease he made a verbal arrangement with the defendant by which the latter was to occupy the premises until the following fall or winter, paying rent at the same rate as before; that defendant continued to occupy the premises; that sometime during the latter part of October, 1918, at defendant's request, he verbally agreed with defendant that the latter would not have to pay any rent for the premises for the coming fall and winter months but would be allowed to retain

possession of the premises, and keep his belongings therein, until plaintiff had procured another tenant, of which fact defendant would be notified and he could then vacate; that defendant thereupon ceased doing the business he had formerly done in the premises, but made occasional visits there to procure his mail, etc., and some of defendant's belongings remained therein; that plaintiff made repeated demands of defendant for the payment of the past due rent for said months from May 15, to October 15, 1918, but that defendant did not pay same claiming that he was short of funds, etc.; that in March, 1919, plaintiff called upon defendant at the latter's home, had an interview with him alone, and notified him that a Mrs. Kaiser wanted to rent the premises; that defendant then told him that he intended to resume his business in said premises and wanted to keep them for himself; that shortly thereafter defendant cleaned up the premises, resumed his business there with plaintiff's consent and continued to occupy the same until August, 1919, when he moved out; and that defendant never paid plaintiff any rent for the period from May 15, to October 15, 1918, or for the second period mentioned. Defendant did not himself testify and his only witness was his bookkeeper, Mildred Bouchier, and her testimony contradicted that of plaintiff on several material points. There was, however, no contradiction of plaintiff's testimony as to his interview with defendant in March, 1919.

It is urged that the judgment should be reversed because plaintiff did not show by the required preponderance of evidence that he was entitled to recover any sum from the defendant. We cannot agree to this. We think that the case was one peculiarly within the province of the jury to determine upon the conflicting testimony and upon the

circumstances in evidence, and that the jury was fully warranted in reaching the conclusion it did.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

BARNES and MORRILL, JJ., concur.

133 - 26300

CAROLA R. HESSERT, Appellee, vs. WILLIAM HESSERT et al., ON APPEAL OF WILLIAM HESSERT, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

222 I.A. 650

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee is the daughter of appellant. In 1901 a savings account in her name was opened in the Illinois Trust and Savings Bank, subject to his control and not to be drawn out except on his signature and presentation of the pass book containing the entries of the deposits. These deposits were made during the first five years of appellant's minority. There were ten of them, aggregating $490, and amounting with interest to $827.60, when the decree appealed from was entered.

On reaching her majority appellant filed her bill in equity claiming her ownership of the fund, that the bank refused to pay it to her on the ground that its withdrawal requires her father's signature, that he refused to give it, and praying that the money so on deposit be decreed to belong to her, free and clear of all claims of her father, and that the bank, which is a party to the bill, be directed to pay the same to her.

Appellant filed his answer and a cross-bill alleging that he opened the account, deposited all the moneys therein, that they were his own and not given by any other person for complainant's benefit, that he never made a gift or parted with the ownership and control thereof; that his former wife,

MR. JUSTICE BOWEN DELIVERED THE JUDGMENT OF THE COURT.

Appellee is the daughter of appellant. In 1901 a savings account in her name was opened in the Illinois Trust and Savings Bank, subject to his control and not to be drawn out except on his signature and presentation of the pass book containing the entries of the deposits. These deposits were made during the first five years of appellant's minority. There were ten of them, aggregating $400, and accumulating with interest to $537.05, when the decree appealed from was entered.

On reaching her majority appellant filed her bill in equity claiming her ownership of the fund, that the bank refused to pay it to her on the ground that the withdrawal requires her father's signature, that he refuses to give it, and praying that the money so on deposit be decreed to belong to her, free and clear of all claims of her father, and that the bank, which is a party to the bill, be directed to pay the same to her.

Appellant filed his answer and a cross-bill alleging that he opened the account, deposited all the moneys therein, that they were his own and not given by any other person for complainant's benefit, that he never sent a gift or parted with the ownership and control thereof; that his former wife,

appellee's mother, deserted him in 1906, going away with the daughter and taking the pass book in question, thereby preventing him from withdrawing the moneys which required its presentation; that he obtained a divorce from his wife in 1908 on the ground of desertion; that the daughter has been out of the State with her mother and he has not seen her since 1906, and that the bank has refused to pay him the money without presentation of said pass book. The cross-bill prays that the money be decreed to be solely his, free and clear of all claims by appellee, that the bank be directed to pay the same to him, and that complainant be directed to surrender the pass book.

On the evidence produced before the chancellor a decree was entered as prayed for in the bill, and the cross-bill was dismissed for want of equity. The decree finds that it was the intention of complainant's parents to open the account for her benefit; that the pass book was duly delivered to complainant; that a valid gift of said moneys, and each and every part thereof, was made to complainant; that she did have, and appellant did not have, the legal and equitable title to said moneys.

Complainant relied mainly on the deposition of her mother, appellant's divorced wife, to support her bill, which the chancellor received in evidence over appellant's objections. The ruling is urged as error, appellant contending it was inadmissible under sec. 5, ch. 51, Hurd's R. S., which provides that "no husband or wife shall, by virtue of sec. 1 of this act, be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage or after its dissolution," except in certain cases within which the case at bar does not fall.

The deposition was to the effect that complainant's mother accompanied appellant to the bank when the initial deposit was made; that it consisted of money given for the benefit of complainant by her grandparents; that appellant gave her the pass book for keeping; that all subsequent deposits were made by her and consisted entirely of gifts to complainant from others than her father, except approximately $25.00 given by the father. The only other testimony for complainant bearing on the question of ownership was that of the attorney who acted for her mother in the divorce proceeding to the effect that in 1908 when it was pending, he asked appellant to have the account placed under the control of complainant's mother, and that while he refused to do so he admitted that it consisted of gifts to complainant. On the other hand, appellant and a witness, who claimed to be present at the interview - had a dozen years before the trial - denied the making of such admission, and appellant testified that the facts were as set forth in his answer and cross bill, and to impeach contrary evidence in the deposition as to who made the deposits, produced the slips of deposit, the first eight being in his handwriting, and the other two in his wife's.

The controlling fact in issue was as to the ownership of the fund, and the material part of her testimony was that the deposits consisted of gifts to complainant from others than her father, except about $25.00 given by him. Her testimony with regard thereto purports to show that her knowledge of the facts came to her from other sources than her husband and not by reason of any confidence growing out of the marital relation. It would be very natural that if the moneys were given to complainant or for her when she was less than five years old the child's mother would be the one likely to know it and obtain the information from the

The deposition was in the effect that complainant's mother accompanied applicant to the bank when the initial deposit was made; that it consisted of money given for the benefit of complainant by her grandmother; that applicant gave her the pass book for safekeeping; that all subsequent deposits were made by her and considerable amounts of gifts to complainant from others than her father, except approximately $28.00 given by the father. The only other testimony for complainant bearing on the question of ownership was that of the attorney who acted for her mother in the divorce proceeding on the effect that in 1928 when it was pending, he asked applicant to have the account placed under the control of complainant's mother, and that while he refused to do so he admitted that it constituted of gifts to complainant. On the other hand, applicant and a witness, who claimed to be present at the interview - but a dozen years before the trial - denied the making of such admission, and applicant testified that the funds were as set forth in his answer and cross bill, and he introduced corroborative evidence in the deposition as to the same the deposits, produced the slips of deposit, the first slips being in his handwriting, and the others in his wife's.

The controlling fact in issue was as to the ownership of the fund, and the material part of her testimony was that the deposits consisted of gifts to complainant from others than her father, except about $28.00 given by him. Her testimony with regard thereto purports to show that her knowledge of the funds came to her from other sources than her husband and not by reason of any confidences growing out of the marital relation. It would be very material that if the moneys were given to complainant or for her when she was less than two years old the validity of such gifts would be the one likely to have it was obtain the information from the

donors; and whether she went to the bank and made deposits of these sums would also be a matter within her own personal knowledge entirely disconnected from the marital relation.

After an extensive review of authorities touching the admissibility of such evidence, the Supreme Court in Mahlstedt v. Ideal Lighting Co., 271 Ill., 154, recognized as the prevailing rule that a husband or wife is not precluded at common law or by statute from testifying to facts not learned through the confidence of the marital relation. The question arises, therefore, do the facts sworn and deposed to by Mrs. Hessert come within this rule?

While she testified that the pass book was turned over to her keeping by her husband, which might appear to be a transaction between them, yet it being one for the benefit of the daughter, the admissibility of her testimony thereon finds support in one of the decisions cited with apparent approval in the Mahlstedt case, supra, - that of Wells v. Tucker, 3 Binn., 366, where a widow was permitted to testify as to the delivery to her of a bond by her husband for the use of a third person.

Whether the deposits consisted of gifts to complainant or of money belonging to appellant would not necessarily be determined by deciding who made the deposits or who rightfully had the custody of the pass book, which the evidence discloses was accessible to both parents while they lived together, but by affirmative evidence on whether the deposits were gifts held by the father in trust. As, therefore, the testimony of the former wife of appellant bearing on this main and controlling question was of matters coming within her knowledge, not through the confidence of the marital relation but from sources outside of her husband, we think it was admissible under the aforementioned rule. If the deposits consisted of gifts to the complainant

then under the proof and circumstances appellant would be deemed to hold them in trust for her, and having reached her majority, she would have a right to assert her title and right to the possession of the fund and be entitled to the relief granted in the decree. If, on the other hand, the deposits consisted of his own money, and, though intended as a gift to her were nevertheless kept under his sole control that was never relinquished, than under decisions that need not be cited, it could not be said that the gift would be complete until he relinquished such control and gave her complete power to withdraw the fund.

We are asked to hold that the greater weight of the evidence was with appellant. While perhaps different conclusions might be reached from it, we should not disturb the findings of the chancellor unless we can say they were manifestly against the weight of the evidence. While on the material facts the evidence for one side was diametrically opposed to that produced by the other, yet when we consider the significant and undisputed fact that most of the deposits were made just after the holidays and complainant's birthday, when it is claimed for appellee that she received most of the gifts, - which is not explained by appellant otherwise than as "mere coincidence" - that appellant has permitted the pass book to remain with the mother and daughter for over thirteen years without demanding its return, and that he made no demand for the fund until notified of complainant's assertion of ownership on her becoming of age, we cannot say the chancellor, with his advantage of seeing and hearing the witnesses before him, was not justified in reaching the conclusion he did from all of the evidence and circumstances.

There would be some basis for appellant's contention that the gifts were not complete without his relinquishment of the control of the fund if the court had held the moneys deposited

were furnished entirely by him. But as the decree of ownership in complainant is based on the theory that the fund was composed of absolute gifts to her from others than appellant, except about $25.00, it must follow that the court accepted the evidence to that effect furnished by complainant.

While it seems to be admitted that approximately $25.00 of the fund came from the father, yet if it was given, as is the effect of the evidence, to be commingled with the rest of the trust fund, then we think it must be regarded as a part of it for which he is accountable as trustee.

Accordingly the decree will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

150 - 26318

J. C. DUNN,
Appellee,

vs.

AMERICAN STATE BANK,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 650

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The judgment appealed from is for $235.99 in favor of plaintiff below, entered on a jury's verdict for that sum. The action is predicated on the alleged negligence by defendant bank in not using reasonable diligence to collect two drafts and in failing to follow instructions in regard to them, and the case was submitted to the jury to determine whether defendant was guilty of such negligence, and whether plaintiff himself was guilty of negligence contributing to the alleged damage.

There is no material dispute as to the facts. Plaintiff Dunn of Coleman, Texas, sold one Jacob Lanski, Chicago, two cars of mixed iron at $23.50 per hundred net ton. The agreement provided that Dunn should draw for the same "against bill of lading showing railroad weights; freight charges to be prepaid or same to be allowed on the invoice;" the material "to be subject to and governed by the weights grading and inspection of the consumer receiving same, and settlement to be made accordingly." Shipment was made September 16 and 17, 1918, and arrived in Chicago October 15th. On September 23rd Dunn made two drafts on said Lanski through the Central State Bank of Coleman for $564.11 and $694.25, respectively, the amounts being based upon said railroad's weights. Said bank forwarded the same to the American State Bank of Chicago on

No. 22221A.

J. G. HUNN,

Appellee,

vs.

AMERICAN RIVER RAIL-
ROAD COMPANY,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BRENTANO DELIVERED THE OPINION OF THE COURT.

The judgment appealed from is for $235.80 in favor of plaintiff below, entered on a jury's verdict for that sum. The action is predicated on the alleged negligence by defendant bank in not using reasonable diligence to collect two drafts and in failing to follow instructions in regard to them, and the case was submitted to the jury to determine whether defendant was guilty of such negligence, and whether plaintiff himself was guilty of negligence contributing to the alleged damage.

There is no material dispute as to the facts. Plaintiff Hunn of Coleman, Texas, sold one Jacob Lamski, Chicago, two cars of mixed iron at $35.80 per hundred net ton. The agreement provided that Hunn should draw for the same "against bill of lading showing railroad weights; freight charges to be prepaid or same to be allowed on the invoice;" the material "to be subject to and governed by the weights, grading and inspection of the consumer receiving same, and settlement to be made accordingly." Shipment was made September 14 and 17, 1910, and arrived in Chicago October 18th. On September 22nd Hunn made two drafts on said Lamski through the Central State Bank of Coleman for $884.11 and $814.28, respectively, the amounts being based upon said railroad's weights. Said bank forwarded the same to the American State Bank of Chicago on

the latter date, asking "no protest". Accompanying said drafts was a letter of instruction saying "this is to advise you that should there be any difference in weights drawn for and the railroad weights that you have the authority to adjust the matter with Mr. Lanski. Also you will please accept the receipted freight bill in part payment of these drafts," also saying that if Lanski paid the drafts upon presentation "we will pay his draft on Mr. Dunn for the freight, the expense bill to be attached to the draft, also will pay any difference in weights should there be a loss."

The bill of lading was issued to J. C. Dunn, Chicago, Illinois, with directions to notify Lanski. It also stated that surrender of original order, bill of lading, properly endorsed, shall be required before delivery of the property. The bills of lading were attached to the drafts and were unendorsed.

When the bills of lading were received an assistant bookkeeper employed by defendant called up Mr. Lanski's office but was unable to reach him, and sent him a notice the same day, namely, September 26, 1918. The next day he again called Lanski's office by telephone with regard to the matter, and the following day he was called back and asked to give the weights of the cars, He gave the weights as they appeared on the bill of lading. On the second day afterward he called Lanski's office again and was again asked by the person responding for the weights, and they were again given. The note teller, to whom he was assistant, having returned from his vacation he turned the matter over to him. This was about October 7, In the meantime nothing further was done about the matter. The note teller then called up Mr. Lanski's office and wanted to know "what they were going to do." The person at the receiver

the latter date, making it probable". Accompanying said proofs was a letter of instruction saying "this is to advise you that should there be any difference in weights shown for and the railroad weights that you have the authority to adjust the weight with Mr. Lamkin. Also you will advise owner the reweighed freight bill in part payment of these co-ts." also saying that if Lamkin paid the draft upon presentation "we will pay his draft on it. Also for the freight, the original bill to be attached to the draft, also will pay any difference in weights should there be a loss."

The bill of lading was issued to G. F. Cato, Orlando, Florida, being addressed to notify Lamkin. It also stated that arrangements of original bill of lading, properly endorsed, must be required before delivery of the property. The bills of lading were attached to the drafts and were presented.

When the bills of lading were received on December, Lamkin's office by defendant called up Mr. Lamkin, either but was unable to reach him, and sent him a notice the same day, namely, December 8, 1921. He did not see Lamkin's office by telephone with regard to the matter, and the following day he was called back and asked to give the weights of the cars. He gave the weights as they appeared on the bill of lading. On the second day afterward he called Lamkin's office again and was again asked by the person responsible for the weights, and they were again given. The main point, to wit, he was assistant, having returned from his vacation he turned the matter over to him. This was about October 7. In the meantime matters further was done about the matter. The main talker then called up Mr. Lamkin's office and wanted to know "what they were going to do." The person at the matter

said that they would call back. Not hearing from Lanski his office was called up from the bank again two days later. Several conversations over the telephone of the same character followed, the final one being on October 18th, when defendant received a telegram from the Texas bank to reduce the drafts to $1200, which was immediately communicated to Lanski. Some one replying said that Lanski would not pay the drafts. The bank replied that it would return them if not paid, and did return the drafts and bills of lading October 18, 1916. It appears that the telegram to defendant to accept $1200 was the result of a telegram from Lanski to Dunn, sent October 15th, saying "your car is about two tons short. Wire bank immediately to accept twelve hundred dollars."

The person acting for Lanski in the matter testified that Lanski wrote Dunn calling his attention to the fact that the freight charges had not been prepaid and asked him to reduce the draft to about $500 more, and that they heard nothing more from Dunn with regard to the matter. Mr. Lanski never made an offer to defendant to pay the bill if the freight rates were deducted. Subsequently the Texas bank asked defendant to dispose of the two cars of iron. This was done through the bank at a loss to defendant to the amount for which the judgment was entered.

As before stated, plaintiff's claim is predicated on the theory of negligence, and the case was tried and went to the jury on that theory, leaving to them to determine whether defendant was guilty of negligence that was the proximate cause of the damage claimed. And the sole question before us is whether or not the undisputed facts as above stated justify the verdict, one of the errors assigned being entry of judgment on such verdict after denying a motion for a new trial.

mail just four weeks back. The letter from Lamont's office was called up from the bank again the day before. Several conversations over the telephone of the same character followed, the final one being on October 14th, when defendant received a telegram from the Texas bank to reduce the draft to $2000, which was immediately communicated to Lamont. Some one replying said that Lamont would not pay the draft. The bank realized that it would return them if not paid, and did return the draft and bills of lading October 16, 1916. It appears that the telegram to defendant to accept $2000 was the result of a telegram from Lamont to them, sent October 12th, saying 'your car is about two days short. Give back immediately to accept twelve hundred dollars.'

The person acting for Lamont in the matter testified that Lamont wrote them making his statement to the effect that the freight charges had not been prepaid and asked him to reduce the draft to about $2000, and that they based subsequent acts from then with regard to the matter. Mr. Lamont never made an offer to defendant to pay the bill of the freight unless were delivered. Immediately the Texas bank wrote defendant to dispose of the two cars of grain. This was done through the bank as - here to defendant as the amount for which the judgment was entered.

On before stated, plaintiff's claim is predicated on the theory of negligence, and the case was tried and went to the jury on that theory, leaving to them to determine whether defendant was guilty of negligence that was the proximate cause of the damage claimed. And the sole question before us is whether or not the undisputed facts as above stated justify the verdict, one of the errors assigned being entry of judgment

That it was the duty of the defendant bank to use due diligence in presenting the drafts for acceptance or payment and to follow the letter of instructions will be conceded. The negligence imputed to defendant is (1) in delay, as we understand it, in not giving personal notice to Lanski that it held the drafts for collection, (2) failure to give the Texas bank notice of nonpayment or any other information regarding collection for 22 days and to return the draft within that time, and (3) failure to adjust the discrepancy in weight and accept the receipted freight bill in part payment, or to advise Lanski that the Texas bank would accept his draft for the freight bill. We must confess our inability to see that the loss which ensued resulted directly from the bank's conduct in the matter. It is apparent from the state of facts above set forth that the loss ensued either from a breach of contract on the part of Lanski, or the failure of plaintiff Dunn to take up Lanski's offer for a settlement or adjustment of weights and freight charges. By Lanski's contract he was to pay the drafts against the bill of lading, which was to be attached thereto. This reasonably contemplated that the title to the bill of lading would pass upon their payment. But the bill of lading attached to the drafts was unendorsed, and without its endorsement the railroad company was not obligated to deliver to Lanski. Suppose, then, the drafts had been immediately presented to Lanski, would he not have been justified in refusing payment because the drafts "were not properly endorsed" so that on their surrender he could get delivery of the goods? Can it be assumed that he would have paid the drafts without such endorsement? That the bill of lading was not endorsed certainly could not be charged up to appellant. But the evidence indicates that Lanski would not have paid the drafts had they been presented to him. He or those

empowered to act for him knew they were at the bank and held there for collection. Lanski did not refuse to pay the drafts because he did not receive personal notice that the bank held them. It is clear that as drawee he would be held to have waived such notice. Whatever was the real reason for his paying no attention to the drafts until October 15th, when the cars arrived, it is apparent that the loss aforesaid was not the result of anything the bank neglected to do in the interim. It was not authorized to deduct the freight charges from the face of the draft without the production of the receipt for them by Lanski, and that could not be done for he never paid them. If it could be said that the bank failed to carry out any of the instructions in the letter of September 25th, we think it was clear that they were superceded by the telegram of October 15th, directing it to accept $1200 in full payment of the draft. It gave notice to Lanski of this telegram, but Lanski, on notice thereof, immediately took up directly with Dunn the matter of a further reduction to cover the freights, and made an absolute refusal to pay the draft for $1200, and then it was immediately returned. It is not before us to decide whether Lanski was right in his claim as to the amount of deductions to be made from the purchase price. If he was, then plaintiff could not recover against him. And if Lanski had no right to insist on such reductions plaintiff had his remedy for a breach of contract. But whether the loss ensued from plaintiff's failure to carry on negotiations for an adjustment of their differences or from a breach of the contract by Lanski, we think it is clear that the evidence does not show that the loss ensued from the mere failure of defendant to give Lanski personal notice of the drafts or from failure to follow any instructions given. Accordingly the judgment will be reversed with a finding of fact that defendant was

supposed to not for him knew they were at the bank and held there for collection. Lamont did not refuse to pay the draft because he did not receive personal notice that the bank held them. It is clear that no duress or fraud could be held to have taken such notice. Moreover, the last reason for his failure to give attention to the draft until October 15th, when the news arrived, it is apparent that the loss sustained was not the result of anything the bank negotiated to do in the interim. It was not authorized to deduct the freight charges from the face of the draft without the production of the receipt for them by Lamont, and that would not be done for be never paid them. It is well that the Yazoo Valley is being put out of the inconvenience in the letter of Superintendent Ellis, we think it and that they were informed by the telegram of October 15th, directing it to accept Lamont in full payment of the draft. It gave notice to Lamont of this telegram, but Lamont, on notice thereof, immediately took up directly with Lamont the matter of a further reconsideration to cover the freight, and made an absolute refusal to pay the draft for claim, nor when it was immediately returned. It is not believe we to decide whether Lamont was right in his claim as to the amount of damages to be made from the purchase price. If he was, then plaintiff could not recover against him. And if Lamont had no right to insist on such reduction plaintiff had the remedy for a breach of contract, but whether the loss caused from plaintiff's failure to carry on negotiations for an adjustment of their differences or from a breach of the contract by Lamont, we think it is clear that the evidence does not show that the loss resulted from the mere failure of defendant to give Lamont personal notice of the draft or from failure to follow any instructions given. Accordingly the judg-

not guilty of the negligence charged.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Morrill, J., concur.

FINDING OF FACT.

We find that appellant, American State Bank, was not guilty of the negligence or want of diligence or failure to follow instructions charged in the statement of claim, and that the loss which ensued to appellee, J. C. Dunn, for which the judgment was obtained, was not the proximate result of anything done or neglected to be done by said appellant.

157 - 26325

LITHFLUX MINERAL & CHEMICAL WORKS, a corporation,
Appellant,

vs.

MERCHANTS CHEMICAL COMPANY, a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 650

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit to recover damages for breach of contract. The sole issue is whether there was an agreement. The facts are undisputed, and the court having found for the defendant, appellee herein, the plaintiff appealed.

Plaintiff's president, a Mr. Ward, called up defendant's office by telephone and inquired the price of a carload of Tri-Sodium Phosphate. In reply defendant on Nov. 17, 1919, wrote plaintiff, saying:

> "Referring to your recent inquiry, we quote you, 1 carload Tri-Sodium Phosphate, in barrels, at $4.90 per 100#, f.o.b. Marcus Hooks, Pennsylvania; terms, 30 days net, less 1% discount for cash in 10 days from date of invoice.
> For shipment in bags, our price would be 10 cents per 100# less.
> We would be in a position to make shipment within one week after receipt of your order, and hope you will find our price merits your placing the business with us."

Defendant acknowledged said letter on November 19th, saying:

> "In reference to the above offering will say that we accept same and you may consider this as our confirmation of the transaction, attached find our order #4482, together with shipping instructions. * * * Trusting that the above will receive your usual prompt attention, we are,
>
> LITHFLUX MINERAL & CHEMICAL WORKS,
> W. V. Ward,
> Mgr."

Enclosed with said letter was an order for a carload of the material at the price and on the terms given in plaintiff's letter. While this negotiation was pending plaintiff made another order for material, and when asked to establish its credit, withdrew the order. The following day the person who conducted both negotiations for defendant had a talk with said Ward about establishing plaintiff's credit. Ward said that "it was not up to him to establish his credit," and threatened suit if the order in question was not filled. The next day, November 21, 1919, defendant wrote plaintiff saying "that in view of the fact that you have not as yet established your responsibility regarding credit with the Merchants Chemical Company we find it impossible to accept your order #4482, and our quotation is therefore withdrawn." There was another exchange of letters in which plaintiff threatened to enforce liability, and defendant asserted its right as to whom it would extend credit.

Appellant claims that appellee by its letter of November 17th, made it an offer which it accepted. Appellee contends that said letter was what it purports to be, namely, a mere quotation of prices and terms given in response to plaintiff's inquiry, and that while it expressed the hope that they might consummate a deal it made no absolute offer to sell to defendant on those prices and terms, and, therefore, it had the right to determine whether or not it would accept plaintiff's order. The court evidently took appellee's view of the construction to be put on the correspondence, and we think it was correct in doing so. The judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

230 - 26412

[illegible], a Corporation,
Appellee,

vs.

MILTON H. [illegible] CO.,
a Corporation,
Appellee.

[illegible] MUNICIPAL COURT
OF CHICAGO.

222 I.A. 650

MR. JUSTICE MARNES DELIVERED THE OPINION OF THE COURT.

This is a suit for damages to appellant's auto truck from being run into by appellee's team of horses while hitched to a coal wagon. Plaintiff having made out a prima facie case defendant submitted its defense consisting mainly of the testimony of its driver. From his testimony it appears that the team was left standing in an alley with the horses heading toward its down grade; that the alley sloped at a grade of 5 to 7 feet from that point to the next intersecting street about a block distant, where the auto truck stood; that the wagon weighed, empty, 4200 pounds; that the tugs were unhooked and a strap running from the back of the wagon pole was fastened to the bit of each horse, a device intended to bring the weight of the wagon on the bits if the horses moved forward; that while the driver was some 25 feet away from his team the horses became frightened at a passing milk wagon and trotted down said grade, pulling the wagon by the bits, and came in collision with the standing auto truck. At the close of the evidence the court directed a verdict for appellee.

We think it was for the jury to say from such evidence whether it was negligence to leave the team hitched in this method where the grade of the street or alley was such that the wagon might be easily started, and if started under such circum-

stances the device could reasonably be expected to prevent the team from running away.

The cases cited by appellant are not applicable to the facts at bar, which the evidence had a tendency to prove, namely, a concurrence of the driver's negligence with the alleged cause of the team's starting.

The judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

248 - 26421

DAVID [illegible] doing business as
[illegible] MANUFACTURING CO.,
Appellee,

vs.

HERMAN L. ARNKOWER,
Appellant.

[illegible] MEMORANDUM OPINION COURT
[illegible] COURT.

222 I.A. 651

MR. JUSTICE DANNEN DELIVERED THE OPINION OF THE COURT.

This is a suit in assumpsit. The declaration contains the common counts, supported by an affidavit of claim, to the effect that the judgment was for goods, etc., manufactured and delivered to defendant, for which there was due $3046.60. Defendant filed a plea of general issue with an affidavit of merits and notice of set-off. The affidavit of merits was stricken and by leave of court an amended affidavit of merits was filed, which on motion of plaintiff was also stricken, and the judgment appealed from was entered for want of a sufficiently verified plea.

While appellant urges among other points the irregularity of a demurrer to the notice of set-off and an order sustaining the same, the real question before us is whether the stricken and amended affidavit of merits did not sufficiently state a valid set-off in averring in substance and effect that plaintiff entered into a contract with defendant to sell its goods exclusively to defendant within a year from and after the date of the contract and not to manufacture them for any other person in Chicago, and violated the same by selling to others within that time, by reason of which defendant suffered losses which were specifically enumerated in the affidavit.

In justification of the striking of such affidavit appellee urges that it was too vague. Whatever defects it may have had, we think it contained sufficient to show a meritorious claim of set-off. On oral argument before us appellee urged that it did not state that the contract in question, which was to be performed within one year from and after its date, was a written contract, and, therefore, did not show that it was a contract that could be enforced under the Statute of Frauds; and, further, that the contract appeared to be unilateral. As to the first contention, the general rule is that the Statute of Frauds, to be availed of as a defense, must be pleaded (Beard v. Converse, 84 Ill. 512), and that a demurrer is an appropriate method of raising the defense only where the case stated affirmatively appears to be within the statute. (Dicken v. McKinley, 163 Ill. 718; Wilke v. Willey, 171 Ill. 546.) By analogy the motion to strike the affidavit should not have been allowed, it not affirmatively appearing therefrom that it was an oral contract not to be performed within one year. Even if the contract referred to in defendant's affidavit of defense falls within the Statute of Frauds it was not void but merely voidable at the will of the plaintiff, and where one does not choose to plead the defense or otherwise raise the point in the suit he will be deemed to have waived it. (Clayton v. Lemen, 233 Ill. 435.)

Nor do we think it appears that the contract pleaded was unilateral. Under it plaintiff agreed to sell and deliver, and defendant to receive, accept and pay for, the goods delivered under it at the prices therein named. We think it was error for the court to strike the affidavit. In this view of the case it is unnecessary to consider the other assignments of error.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

277 - 26451

F. M. GROTOWSKI, doing business as Avondale Chandelier Company, Appellant, vs. JACOB ROTHSCHILD et al., doing business as Rothschild & Guthman, Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY. 222 I.A. 651

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The declaration in this case was on a promissory note for $185 of the law firm of Guthman & Rothschild, appellees, payable on or before six months from its date, February 17, 1916, to the order of Harry Felgar. Appellees filed the plea of general issue and a notice of special defenses, among them, that appellant was not the owner of the note at maturity; that it was not endorsed or delivered prior to maturity, and that appellees paid the payee $177 after its maturity and tendered him the balance of $8 before the suit.

Plaintiff introduced the note and rested on his prima facie case. In defense Rothschild testified that Felgar presented the note to him for payment after its maturity; that it was then unendorsed; that afterwards he paid him by the firm's checks $177 and tendered him the balance; that later one Schotke demanded money on the note, and he then called up Felgar on the telephone with regard to it and Felgar agreed to get the note from Schotke. Guthman testified that he saw the note in Schotke's possession. This evidence tended strongly to show that Felgar was the real owner of the note at its maturity and afterwards.

In rebuttal plaintiff testified that he bought the note from Felgar, who was acting as his attorney, June 15, 1916. While Felgar corroborated him and denied that the

CITY - DEBOT

P. H. MUSCOVONI, suing business as Kenmore Commodities Company, appellant,	
vs.	
Frank Dalmonico et al., doing business as Dalmonico & Dalmonico, appellees.	

MR. JUSTICE MARKS DELIVERED THE OPINION OF THE COURT.

The controversy in this case rose on a promissory note for $1850 of the law firm of Dalmonico & Dalmonico, appellees, payable on or before six months from its date, February 17, 1921, to the order of Jerry Felger. Appellees filed the plea of general issue and a notice of special defense, among them, that appellant was not the owner of the note at maturity; that it was not endorsed or delivered prior to maturity, and that appellees paid the payee $177 after its maturity and tendered him the balance of $8 before the suit.

Plaintiff introduced the note and rested in his opening case. In defense Dalmonico testified that Felger presented the note to him for payment after its maturity; that it was then unendorsed; that afterwards he paid him by the firm's check dit and bookeep his balance; that later one Kabatie demanded money on the note, and he then called up Felger on the telephone with regard to it and Felger agreed to get the note from Kabatie. Dalmonco testified that he saw the note in Kabatie's possession. This evidence tended strongly to show that Felger was the real owner of the note at its maturity and afterwards.

In rebuttal plaintiff testified that he bought the note from Felger, who was acting as his attorney, June 1,

unendorsed note presented to Guthman was the note in question, he held an unexplained and inconsistent position in retaining the payments made to him on the note after its maturity and then, both as plaintiff's attorney in drawing his pleadings in the case and as his witness, aiding plaintiff to recover the amount of such payments a second time. The jury may well have taken these facts into consideration when they found for appellees, and we cannot say that their verdict was against the manifest weight of the evidence.

It is urged that it was error to receive the evidence as to Schotke. It was admissible to impeach plaintiff's testimony to the effect that the note had remained in his possession all the time, and also material in connection with evidence that Felgar had agreed to get the note back from Schotke, in whose possession it was seen after its maturity, as tending to show the exercise of ownership by Felgar, and that appellant was not the owner when the suit was brought. If appellant was not the owner then he was not entitled to recover, as claimed, the balance due on the note.

The fact that the verdict was for "defendant" and not "defendants" is not invalid for uncertainty or as not being responsive. (West Chicago Street R. R. Co. v. Horne, 197 Ill. 250; Bacon v. Schepflin, 185 Ill., 122.) The judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

unendorsed note presented to Guthman was the note in question. He held on unexplained and inconsistent position in refusing the payments made to him on the note after its maturity and then, both on plaintiff's attorney in drawing his pleadings in the case and on his witness, asking plaintiff to recover the amount of such payments a second time. The jury may well have taken these facts into consideration when they found for appellant, and we cannot say that their verdict was against the manifest weight of the evidence.

It is urged that it was error to receive the evidence as to Coberly. It was admissible to impeach plaintiff's testimony to the effect that the note had remained in his possession all the time, and also material in connection with evidence that Talper had agreed to get the note back from Coberly, in whose possession it was when after its maturity, as tending to show the exercise of ownership by Talper, and that appellant was not the owner when the suit was brought. If appellant was not the owner then he was not entitled to recover, as claimed, the balance due on the note.

The fact that the verdict was for "defendant" and not "defendants" is not invalid for uncertainty or as not being responsive. (Rock Island Stone Co. v. Ins. Co., 1 Ill. App. 121; Bacon v. Schoenfelin, 180 Ill., 128.) The judgment will be affirmed.

Affirmed.

Smith, P. J., and Barrett, J., concur.

356 - 26530

ROBERT M. SCHRAYER,
Appellee,

vs.

MOVIE SMOKE SHOP COMPANY
and WILLIAM COHEN,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for possession in a forcible detainer suit, and the only question presented is whether the verdict was against the weight of the evidence.

Plaintiff, the appellee, claimed that defendants' tenancy was from month to month, and defendants, appellants, that they held under an oral lease for a year. When in October, 1919, plaintiff became the owner of the premises defendants were occupying them under a month to month tenancy expiring on the 20th of each month, and it is undisputed that they continued to hold under such tenancy until the following June. The question of fact for the jury to determine was whether there was a change of tenancy in that month. The burden of proving the same rested on defendants. It consisted of the testimony of defendant Cohen and another, against plaintiff's denial, that in a conversation on June 21st at the premises in question, plaintiff agreed to lease them for one year from that date. Because as to that conversation defendants produced two witnesses to one they urge that the verdict was against the weight of the evidence. If the matter were to be determined on the mere basis of numbers - which alone is never the test of the weight of evidence - plaintiff supported his denial of such conversation by the testimony of two witnesses, himself and another, to the effect

that he was in another place at the time in question. He also presented the testimony of two witnesses, himself and another, against Cohen's denial, that in the month of July following when Cohen was served with a thirty day notice as the basis of this suit, he offered plaintiff $50 additional rent if he would let defendants continue their tenancy. Such an offer, if made, was unquestionably inconsistent with the claim that there was a change of tenancy. The jury in determining the credibility of the witnesses upon such contradictory evidence may well have taken into consideration the circumstances as to the well known conditions of the time and that such a change of tenancy without an increased rental gave plaintiff no particular advantage, whereas defendant would naturally have asked for a written lease. We fail to see under this state of the record that the verdict was manifestly against the weight of the evidence. Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

that he was in another place at the time in question. He also presented the testimony of two witnesses, himself and another, against Cohen's denial, that in the month of July following when Cohen was served with a thirty day notice on the basis of this suit, he offered plaintiff THE additional rent if he would let defendant continue their tenancy. Even at trial, if made, was unpersuasively inconsistent with the claim that there was a change of tenancy. The jury in determining the credibility of the witnesses upon such contradictory evidence may well have taken into consideration the circumstances as in the well known conditions of the time and that such a change of tenancy without an increased rental gave plaintiff no particular advantage, whereas defendant would obviously have asked for a written lease. It is not to see under this state of the record that the verdict was manifestly against the weight of the evidence. Accordingly the judgment will be affirmed.

AFFIRMED.

Stilley, P. J., and Dorrell, J., concur.

377 - 26551

FRANK A. STARK,
Appellee,

vs.

RICHARD J. TIDDLES et al.,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

222 I. A. 651

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit, as stated in the statement of claim, on an appeal bond given on an appeal from a judgment for possession entered in a forcible detainer suit October 18, 1919. It is charged that the defendant Tiddles retained possession until January 19 following, and that a reasonable charge for his use and occupation until that time, together with the unpaid rent for October, was $173.50. None of the averments of fact in the statement of claim was denied in the affidavit of merits, which presented as the only grounds of defense (1) that Tiddles did not wrongfully withhold the premises; and (2) that prior to October 1, 1919, the plaintiff committed such acts as amounted to an eviction of the defendant, causing damage which defendant pleaded in recoupment.

The only proof defendant offered was that bearing on his claim of right to reduction of damage to the sum of $75 admitted to be due. The court rejected his offer of proof, apparently on the ground that the affidavit of merits alleged that the acts of eviction were prior to October 1st. The court, however, later let in evidence relating to acts of the landlord subsequent to October 1st. While this evidence was improperly received, it was disregarded in the instructions of the court, and we do not think appellants can complain that the court instructed the jury that upon the evidence they could find as damages the

amount due under the lease for the October rent, which was not questioned, and in addition thereto such damages as the evidence warranted. As the evidence included said lease and the proof of the reasonable value of the premises for the hold-over period, and neither was questioned, and as defendant could not properly introduce evidence on matters not pleaded in its affidavit of merits and does not question the right to bring action upon the bond, we find no errors for which the judgment should be reversed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

50 - 26691

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.	
SAMUEL C. LEWIS, Plaintiff in Error.	

222 I.A. 651

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of conviction upon an information under section 30 of the Motor Vehicle Act, approved June 30, 1919, and in force January 1, 1920. The information is defective in the same respects as that in case No. 26690, People v. Blue, in which we have this day filed an opinion reversing the judgment. What is said in that case is applicable in every respect to the instant case, and the judgment in this case must be reversed for the same reasons.

REVERSED.

Gridley, P. J., and Morrill, J., concur.

51 - 26692

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

FRANK MONACO,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 652

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of conviction upon an information under section 30 of the Motor Vehicle Act, approved June 30, 1919, and in force January 1, 1920. The information is defective in the same respects as that in case No. 26690, People v. Blue, in which we have this day filed an opinion reversing the judgment. What is said in that case is applicable in every respect to the instant case, and the judgment in this case must be reversed for the same reasons.

REVERSED.

Gridley, P. J., and Morrill, J., concur.

60 - 26706

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HENRY PFAFF, Jr.,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

222 I.A. 652

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of conviction upon an information charging that defendant, appellant here -

> " * * Did sell or offer for sale in this State or who shall own or have the custody or possession of a motor vehicle the original number of which has been destroyed, removed, altered or covered or defaced or who shall sell or offer for sale, own or have the custody or possession of a motor vehicle having no engine number in violation of section 35 of the Motor Vehicle Law of Illinois, contrary to the form of the statute in such case made and provided, and against the Peace and Dignity of the State of Illinois."

The trial was before the court without a jury, and the finding was that said defendant "is guilty of the criminal offense of unlawfully and knowingly have in his possession an offer for sale and did sell a motor vehicle the original number of said motor vehicle having been changed, on said finding of guilty."

The case seems to have been tried on the theory that defendant gave a bill of sale of an automobile which designated that the motor had no number. The purchaser and his attorney, who examined the motor, testified that they found none. Defendant and his witness introduced evidence to the effect that the motor did have an engine number and produced a photograph of the engine showing the number on it.

Had there been a motion to quash the information

it would probably have been granted, for it is a fundamental rule of criminal pleading that whenever the word "or" would leave the averment uncertain as to which of two or more things is meant, it is inadmissible and makes the allegation bad for uncertainty as to which one of two things is meant. (Bishop's New Criminal Procedure, Vol. 1, Sec. 585.) Because in some cases the disjunctive part of the pleading may be regarded as surplusage it is urged by counsel for the People that the information in question may be read as charging that defendant "did sell or offer for sale in this State a motor vehicle having no engine number, in violation of Section 35," etc. But even in this form of allegation, that the defendant "did sell <u>or</u> offer for sale," the information retains the defect of a disjunctive averment. As said in <u>People</u> v. <u>Brander</u>, 244 Ill., 36, "Courts must abide by long established and well known rules of law, and it is not too much to require reasonable attention to such rules in drawing indictments." Of course, this also applies to informations.

But regardless of the sufficiency of the information or the responsiveness of the finding, we think the finding of the court, construing it to mean that defendant sold a motor vehicle having no engine number, was clearly against the manifest weight of the evidence, and for that reason the judgment will be reversed.

REVERSED.

Gridley, P. J., and Morrill, J., concur.

it could probably have been proven, nor is it a fundamental rule of criminal pleading that wherever the word "or" would leave the accused uncertain as to which of two or more things is meant, it is inadmissible and makes the indictment bad for uncertainty as to which one of the things is meant. (Bronson's Bar Criminal Pleadings, Vol. 1, Pg. 324.) However in some cases the disjunctive part of the pleading may be regarded as surplusage if it appears by counsel for the people that the information in question may be read as charging the defendant "did sell or offer for sale in this State a copy of" such-and-such an origina number, in violation of Section 24, etc. But even in this form of allegation, that the defendant did sell or offer for sale, the information violates the rule of a disjunctive statement. As said in People v. Bennett, 24 Hun., 24, "Courts must strive to keep penitentiary and jail doors open wide enough to let in the box ton and to admit innocuous witnesses to come into court to drawing indictments." If anyone, who does not realize it is-- Fairmiller.

The requisition of the multitudinous of the information or the requisitions of the finding, we think the finding of the court, considering it to mean that defendant made a notor vehicle driven on public highway, but itself against the weight of the evidence, and for that reason the judgment will be reversed.

Respectfully,

Erskine, R. C., and Torrill, J., concur.

102 - 26268

ELAM GRAY,
Appellee,

vs.

J. H. HOUSER,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 652

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court for services alleged to have been rendered by him as a draughtsman in the employ of the defendant, who was a construction engineer. Plaintiff had been employed by defendant from 1907 to January 1, 1918, and was paid for his services at the rate of 80¢ per hour, except for the period between October, 1914, and January, 1916. During that period plaintiff was paid one-half of his regular compensation. This arrangement was made by defendant on account of the condition of his business, which during that period did not warrant him in retaining his full staff of employees at their regular rate of compensation.

The controversy in the case arises over the terms of the agreement made at that time. Plaintiff contends that the balance due him for services rendered was "held in abeyance" until such time as the state of the business would enable the defendant to pay. On the other hand, the defendant alleges that the balance unpaid was held in abeyance until it could be determined whether or not the orders on which the work was done ripened into contracts. At any rate $40 per week was paid and the balance was "held in abeyance," as is

shown by the payment slips offered in evidence. It is admitted that at the time the suit was brought defendant owed plaintiff at least $37.40. Defendant insists that the burden was upon the plaintiff of proving that the conditions precedent to the payment of the balance of the wages had been performed. In other words, defendant claims that he has established the existence of the contract according to his theory of it as above stated and that the burden of proof is upon the plaintiff to show that he, the defendant, had collected on the orders on account of which the work was done. We cannot agree with this contention. The record shows that defendant himself, who was a witness in the case, was unable to state which of the orders - some twenty-two hundred in number - had been filled. His testimony seems to show that a number of orders on which payment to the plaintiff had been withheld had been completed. In view of this testimony, no evidence on the part of plaintiff was required. The jury heard the testimony upon these subjects and it was their duty to determine the facts. The trial judge also saw and heard the witnesses and approved the verdict of the jury. It is a familiar rule that under such circumstances this court will not disturb the verdict unless it is manifestly contrary to the weight of the evidence, which is not the case. Piper v. Andricks, 209 Ill., 565; Healea v. Keenan, 244 Ill., 484, 488.

There was also a special verdict and finding that the services of plaintiff were those of an employee of the defendant for wages, and in conformity with this verdict the Municipal Court entered an order finding that a demand had been made upon the defendant at least three days before the suit was brought for a sum not exceeding the amount found due and owing herein, and that a reasonable attorney's fee, amounting to $150, be allowed to the plaintiff and taxed as part of the costs. This finding and

shown by the payment slips offered in evidence. It is admitted that at the time the suit was brought defendant owed plaintiff at least $17.40. Defendant insists that the burden was upon the plaintiff of proving that the conditions precedent to the payment of the balance of the wages had been performed. In other words, defendant claims that he has established the existence of the contract according to his theory of it as above stated and that the burden of proof is upon the plaintiff to show that he, the defendant, had collected on the orders on account of which the work was done. To counter argue with this contention, the record shows that defendant himself, who was a witness in the case, was unable to state which of the orders - some twenty-two involved in number - had been filled. His testimony seems to show that a number of orders on which payment to the plaintiff had been withheld had been cancelled. In view of this testimony, no evidence on the part of plaintiff was required. The jury heard the testimony upon these questions and it was their duty to determine the facts. The trial judge also saw and heard the witnesses and approved the verdict of the jury. It is a familiar rule that under such circumstances this court will not disturb the verdict unless it is manifestly contrary to the weight of the evidence, which is not the case. Brown v. Spalding, 108 III. 44; Dodge v. Brown, 111 III. 121, 124, 126.

There was also a special verdict and finding that the services of plaintiff were those of an employee of the defendant for wages, and in conformity with that verdict the municipal court entered an order finding that a demand has been made upon the defendant at least three days before the suit was brought for a sum not exceeding the amount found due and owing herein, and that a reasonable attorney's fee, according to law, be allowed in the

order of the Municipal Court are not supported by the evidence. It appears from the record that the demand in question was for the sum of $1159.40, which is much in excess of the amount found due by the jury. It is apparent, therefore, that the notice did not comply with the statute upon which it is based. Moore v. Terhune, 161 Ill. App., 155; Fletcher v. Massey, 49 Ill. App., 36. It should be noted also that this was a suit for salary and not for wages.

The order of the Municipal Court allowing an attorney's fee of $150 cannot be sustained. The judgment of the Municipal Court for the sum of $624.80 is affirmed, provided the plaintiff remits within ten days the sum of $150, taxed as costs, otherwise the judgment will be reversed and the case remanded.

AFFIRMED ON REMITTITUR.

Gridley, P. J., and Barnes, J., concur.

147 - 26315

SPINGEL, MAY, STERN COMPANY,
Defendant in Error,

vs.

WALKER D. HINES, Director General of Railroads, operating the NEW YORK CENTRAL RAILROAD COMPANY, a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

222 I.A. 652

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Action was brought against the defendant as delivering carrier on an interstate shipment of fifty-four gross of Coca-Cola sets shipped by plaintiff to Samuel T. Bernstein, New York city, on January 30, 1918, because of the failure of the defendant, operating the New York Central railroad, to deliver the same to the consignee. The statement of claim alleges that the merchandise was delivered to the defendant under a bill of lading known as the "uniform bill of lading," and that the loss of the merchandise was due to delay or damage while the said merchandise was being loaded or unloaded.

The affidavit of merits sets up as a defense clause 3, section 3, of the bill of lading, which is as follows:

> "Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence as conditions precedent to recovery, claims must be made in writing to the originating or delivering carrier within six months after delivery of the property (or in case of export traffic, within nine months after delivery at port of export), or in case of failure to make delivery, then within six months (or nine months in case of export traffic) after a reasonable time for delivery has elapsed; and suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed."

The affidavit further alleges that plaintiff did not present a claim

within six months after a reasonable time for delivery had elapsed and did not institute suit within two years and one day after a reasonable time for delivery of said shipment had elapsed, as required by the provisions of said bill of lading. There is no question but what the provisions of clause 3, section 3 in the uniform bill of lading are valid and binding and must be complied with by the complainant as conditions precedent to maintaining his suit. Georgia, Florida & Alabama Railway Company v. Blish Milling Co., 241 U. S., 190. The rule laid down in that case has been followed by this court in a number of cases and the question is not now open to debate.

It is admitted that the goods were received by the defendant and were not delivered by him. March 26, 1918, plaintiff wrote to the agent of the defendant advising him that the shipment had not been received and requesting that it be traced to its destination. It is contended by defendant and not seriously disputed by the plaintiff that this letter was not a claim within the provisions of the bill of lading requiring that a claim for damages for failure to deliver should be made to the carrier within six months. This contention is sound and the letter in question cannot be regarded as a claim within the meaning of the provision of the bill of lading above quoted. It is agreed that the cases were not delivered, and therefore, the necessity arose of making a demand within six months after a reasonable time for delivery had elapsed. This is an indispensable condition precedent and there can be no recovery unless there has been a compliance with this provision, unless it can be shown that the loss complained of was due to delay or damage while being loaded or unloaded.

The only evidence upon this subject was the testimony of the traffic manager of the plaintiff and certain correspondence

within six months after a reasonable time for delivery has elapsed and did not tender unit within ten years and one day after a reasonable time for delivery of such shipment had elapsed, as required by the provisions of Uniform Bill of Lading. There is no question but that the provisions of section 8, section 9 in the uniform bill of lading are valid and binding and must be complied with by the complainant as a condition precedent to maintaining his suit. Georgia, Florida & Alabama Railway Company v. Blair Milling Co., 254 U. S. 100. The trule laid down in that case has been followed by such courts in a number of cases and the question is not now open to debate.

It is admitted that the goods were received by the defendants and were not delivered by him. March 20, 1918, plaintiff wrote to the agent of the defendant advising him that the shipment had not been received and requesting that it be traced to its destination. It is contended by defendant and strenuously disputed by the plaintiff that this letter was not a tender within the provisions of the bill of lading requiring that a claim for damages for failure to deliver should be made to the carrier within six months. This contention in fact was the ultimate question cannot be reported as a claim within the meaning of the provision of the bill of lading above quoted. It is argued that the goods were not delivered, and therefore, the necessity arose of making a demand within six months after a reasonable time for delivery had expired. This is an entirely reasonable interpretation and there can be no recovery unless there has been a compliance with this provision, unless it can be shown that the loss complained of was due to delay or damage while being loaded or unloaded.

The only evidence upon this subject was the testimony of the traffic manager of the plaintiff and certain correspondence

offered in evidence. From this evidence, which is uncontradicted, it appears that upon an attempt being made to trace the goods, it was reported that they were included in the manifest of "N. H. car No. 73691." The agent of the defendant at East Buffalo, New York, reported as to "N. H. car No. 17691" to the effect that the shipment in question "did not check over at this station." Plaintiff assumes that the agent at East Buffalo made a mistake in referring to car 17691 and really meant to say that he had checked over the manifest of car 73691, but unfortunately there is no evidence to support this theory. From the fact that the shipment did not "check over" at East Buffalo, plaintiff's traffic manager reached the conclusion that the goods in question were not shipped and consequently that the loss was due to delay while the goods were being loaded, so as to bring the case within the exception mentioned in clause 3 of section 3 of the bill of lading.

We do not think that the evidence justifies this conclusion. The judgment of the Municipal Court is therefore reversed with finding of facts.

REVERSED WITH FINDING OF FACTS.

Gridley, P. J., and Barnes, J., concur.

offered in evidence. From this evidence, which is unchallenged, it appears that upon an attempt being made to trace the goods, it was reported that they were involved in the manifest of "H. H. Ser Ko. Ltd." The agent of the defendant at Port Dalrymple, Mr. Stark, reported to "H. H. Ser Co. Ltd." to the effect that the shipment in question "did not check over at this station." PLAINTIFF assumes that the agent at Port Dalrymple made a mistake in referring to Ser Ltd. and really meant to say that he had checked over the manifest of Ser Ltd., but unfortunately there is no evidence to support this theory. From the fact that the shipment did not "check over" at Port Dalrylp, plaintiff further argues the conclusion that the goods in question were not shipped and consequently that the loss was due to delay while the goods were being found, or to be being the case within the exception mentioned in clause 3 of section 5 of the Bill of Lading.

We do not think that the evidence justifies this conclusion. The judgment of the Magistrate Court is therefore reversed with Costs of Appeal.

Bailey, J., J., and Brown, J., concur.

147 - 26315

FINDING OF FACTS.

We find as ultimate facts in this case that plaintiff did not make its claim for loss within the time limited by clause 3 of section 3 of the bill of lading, and that the loss complained of was not due to delay or damage while the goods in question were being loaded or unloaded.

156 - 26324

MULLER-FOX BROKERAGE COMPANY, a corporation, Appellee, vs. LITHFLUX MINERAL & CHEMICAL WORKS, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The statement of claim of Muller-Fox Brokerage Company, the appellee here, alleges in substance that on December 18, 1918, the defendant purchased from it thirty barrels of corn syrup at 10¢ per pound, to be paid for in cash upon presentation of delivery order, amounting to $2061; that thereafter plaintiff tendered to defendant the delivery order for such merchandise and requested payment therefor, which was refused; that thereafter plaintiff notified defendant that it would hold said merchandise a reasonable time for acceptance by defendant; that after the lapse of such reasonable length of time defendant refused to accept the merchandise and thereupon plaintiff sold the same at the best obtainable market price, which was 6½¢ per pound, amounting to $1339.65; and that thereby the defendant became indebted to the plaintiff for the difference between $2061, the contract price, and $1339.65, the amount realized from the sale, being $721.35, for the recovery of which the suit was brought.

The affidavit of merits alleges in substance that there never was any contract of sale between the parties, and even if such contract existed it would be violative of

MILLER-TOX MOUNTAIN COMPANY,
a corporation,
Appellant,

vs.

LIBERTY BERGER & SONS,LTD.
a corporation,
Appellees.

Appeal from
District Court

MR. JUSTICE MONTIN, DELIVERING THE OPINION OF THE COURT.

The statement of claim of Miller-Tox Mountain Company, the appellee here, alleges in substance that on December 18, 1918, the defendant purchased from it thirty barrels of corn syrup at $2.00 per pound, to be paid for in cash upon presentation of delivery order, amounting in $3000; that thereafter plaintiff tendered to defendant the delivery order for such merchandise and requested payment therefor, which was refused; that thereafter plaintiff notified defendant that it would hold said merchandise a reasonable time for acceptance by defendant; that after the lapse of such reasonable length of time defendant refused to accept the merchandise and thereupon plaintiff sold the same at the best obtainable market price, which was 62¢ per pound, amounting to $1249.68; and that thereby the defendant became indebted to the plaintiff for the difference between $3000, the contract price, and $1250.32, the amount realized from the sale, being $749.68, for the recovery of which the suit was brought.

The affidavit of merits alleges in substance that there never was any contract of sale between the parties, and even if such contract existed it would be violative of

Par. 1, Sec. 4 of the Uniform Sales Act, for the reason that no part of the merchandise was received by defendant, no part of the purchase price paid as earnest money and no memorandum in writing of the contract signed by the defendant or its agent. There was a trial before the court without a jury, resulting in a finding and judgment in favor of the plaintiff for $721.35 and costs, a reversal of which is now sought upon the ground that the judgment is contrary to law. Par. 1, Sec. 4 of the Uniform Sales Act, which is relied upon by the defendant, is as follows:

> "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

The record shows that the only question submitted to the court was whether or not there had been any acceptance of the goods by words or conduct within the meaning of Par. 3 of Sec. 4 of the Uniform Sales Act. There was no dispute as to the contract price or the amount realized from the sale of the merchandise and no claim by plaintiff that there was any written memorandum of the same or that the defendant paid any part of the purchase price. The evidence shows that the alleged purchase was made through a broker who gave the order to the plaintiff. On the following day, the plaintiff presented to the defendant an order for the merchandise upon the warehouse where the same was stored and requested payment. The person in charge of defendant's office then stated that

there was no one present authorized to sign defendant's check for the purchase price and that it would be necessary for plaintiff's representative to come back later. Representatives of the plaintiff subsequently called upon the defendant approximately ten times within the next three or four days, presented the delivery order, requested payment, received practically the same answer and went away. Subsequently notice was given to defendant and the merchandise sold as alleged in the statement of claim.

Although plaintiff has alleged in its statement of claim in several places that defendant refused to accept the merchandise, the contention is made in its behalf that there was in fact an acceptance of the merchandise within the meaning of Par. 5 of Sec. 4 of the Uniform Sales Act, which is as follows:

> "There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods."

It is the theory of the plaintiff that defendant had by its words and conduct assented to become the owner of the merchandise, thereby taking the case out of the provisions of Par. 1 above quoted. The only evidence relied upon in support of this theory is the statement of one of plaintiff's witnesses - a representative of the brokerage concern which had placed the order with plaintiff - to the effect that a salesman of defendant company had requested said witness to resell the merchandise in question.

The leading case upon this subject upon which plaintiff relies is Blenkinsop v. Clayton, 7 Taunt., 597, which holds that a resale by the vendee constitutes an acceptance in a case where the goods did not come into the actual possession

There was no one present authorized to sign Plaintiff's check for the purchase price, and it would be necessary for Plaintiff's representative to come back later. Representatives of the plaintiff nevertheless came back, but defendant immediately ran down within his back three or four days, presented the delivery order, requested payment, received satisfactorily the same amount and went away. Unfortunately which was given to defendant and the merchandise sold is alleged to be identical with claim.

Although plaintiff has alleged in its statement of claim in several places that defendant refused to accept the merchandise, the contention seems to be that it should not be thought that it first in consequence of the mere fact that it was willing to accept the delivery order, and that the claim then arose, which is as follows:

> "There is no evidence of fraud or bad faith the contention of that arising when the buyer, either before or after delivery of the goods, expressed by words or conduct his general to accepting the order of these specific goods."

It is the theory of the plaintiff that the defendant by the words and conduct evidenced to change the nature of the merchandise, thereby taking the case out of the jurisdiction of the Court, I have quoted. The only evidence relied upon in support of this theory is the testimony of one of plaintiff's witnesses - a representative of the Dominion Canning Co. Ltd. who stated the error with plaintiff - is the also a case a witness of defendant company had mentioned that chance to recall the merchandise in question.

The leading case upon this subject upon which plaintiff relies is Hamilton v. Jenkins 1 Times, 707, which holds that a claim by the vendee conditioned on everything is a mere nullity and cannot affect the contract between

of the vendee. The offer to resell alleged to have been made by the salesman, which appears to have been wholly unauthorized, cannot be construed as a resale of the goods. There is no evidence in the record that defendant ever took any action whatever with reference to the merchandise in question. The goods were never delivered. Consequently it is impossible to reach the conclusion that the defendant "either before or after the delivery of the goods" expressed by words or conduct his assent to become the owner thereof in conformity with Par. 3 above quoted. It follows that the contract in question was not enforceable by action. R. S., sec. 4, par. 1, chap. 121a.

The judgment of the Municipal Court is therefore reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

of the tendon. The effect is usually slight in those tendons
by the endoscopes, which appears to have been totally unsuccessful,
cannot be considered as a result of the graft. There is no
evidence in the records that bilateral heel lock was within clas-
sical with reference to the metatarsalgia in question. The pseudo
arthrosis was never discovered. Consequently it is impossible to reach
the conclusion that the patient "without benefit of after the
delivery of the graft" recovered by merit or technical fit account
to because the motor tendon in contingency with the 2 inner
muscle. It follows that the statement in question was not in-
fallibility in evidence. X, 2., art. 8, par. 3, chap. 1Ch.

The judgment of the material point is therefore
reversed.

Grimley, J., dis. and Stokes, J., concur.

270 - 26444

ANTON C. STEPHAN and
THE STEPHENS ENGINEERING
COMPANY,
Appellees,

vs.

CLAUDE D. STEPHENS and
THE FIDELITY and CASUALTY
COMPANY OF NEW YORK,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 653

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The action in this case is based upon an injunction bond given by appellants in the Circuit Court of Cook County in a case where the appellant Stephens had obtained an injunction restraining the prosecution of a forcible entry and detainer suit. The bond was in the usual form and provided for the payment of all damages sustained by the wrongful issuance of the injunction and all costs and damages awarded against the complainant Stephens (one of the appellants) in case of the dissolution of the injunction. Upon the dissolution of the injunction in the Circuit Court, appellees filed in that court a written suggestion of damages in conformity with the provisions of the injunction act upon that subject. On the hearing the Circuit Court awarded appellees the sum of $193.75 as their damages. The amount assessed as damages remaining unpaid, appellees then brought suit in the Municipal Court upon the injunction bond. The case was heard before the court without a jury and a judgment entered for $193.75, the amount awarded as damages by the Circuit Court upon the dissolution of the injunction. From this judgment this appeal is prosecuted. A certified copy of the order of the Circuit Court assessing the

The action in this case is based upon an injunction bond given by appellants in the Circuit Court of Cook County in a case where the appellant stephens had obtained an injunction restraining the prosecution of a [illegible] suit and replevin suit. The bond was in the usual form and providing for the payment of all damages sustained by the wrongful issuance of the injunction and all costs and damages awarded against the complainant stephens (one of the appellants) in case of the dissolution of the injunction. Upon the dissolution of the injunction in the Circuit Court, appellees filed in that court a written suggestion of damages in conformity with the provisions of the injunction act upon this subject. In the hearing the Circuit Court awarded appellees the sum of [illegible] as their damages. The amount assessed as damages remaining unpaid, appellees then brought suit in the municipal court upon the injunction bond. The case was heard before the court without a jury and a judgment entered for [illegible], the amount assessed as damages by the Circuit Court upon the dissolution of the injunction. From this judgment [illegible] appeal be prosecuted. A motion may of the order of the Circuit Court assessing the

damages as above stated and a copy of the injunction bond in question were offered and received in evidence. No evidence was offered on behalf of defendants.

It is now urged by appellants that the judgment should be reversed because the record does not show the order of the Circuit Court requiring the injunction bond in question to be filed. Defendant's affidavit of merits admits in substance that such an order was entered by the Circuit Court. In view of the fact that no objection was raised by the appellants in the court below to the admission of the bond in question, their objection to the judgment cannot now be considered, even if the same were otherwise meritorious, which does not appear to be the case.

It is also urged that the surety upon the injunction bond is not bound by the decree assessing damages for the reason that he was not a party to the original action.

All of the questions involved in this case have been fully settled by prior decisions of the court. The evidence in the record was sufficient to support the judgment. Nothing further was necessary to be shown on behalf of the plaintiff. The surety on the bond was bound by the decree in the suit in which the bond was given exactly in the same manner as the parties to that suit. The surety undertook to pay all costs and damages which might be awarded in case the injunction should be dissolved. Upon the dissolution of the injunction the damages were assessed for the amount above stated. There was no appeal from the decree assessing the damages. It therefore stands in full force and effect and the amount can be recovered in a suit on the bond. McAllister v. Clark, 84 Ill. 326; Beaver v. Beyer, 73 Ill., 490. Similar questions were passed upon by this court in Garst v. Jackson, 211 Ill. App., 360, and the authorities upon the subject fully reviewed and all questions

raised by appellants herein decided adversely to their contention. In deciding this case we are required only to restate propositions of law which have been previously determined in published opinions. We are therefore compelled to regard the appeal in this case as prosecuted for delay. Town v. Alexander, 185 Ill., 254; R. S. chap. 33, sec. 23.

The judgment of the Municipal Court will therefore be affirmed and in addition thereto judgment is entered against appellants in favor of appellees for ten per centum on the amount found due by the judgment in favor of said appellees.

AFFIRMED WITH DAMAGES.

Gridley, P. J., and Barnes, J., concur.

295 - 26469

EMILY MOTZER, Appellee,	)	
	)	APPEAL FROM
vs.	)	MUNICIPAL COURT
	)	OF CHICAGO.
NORTH AMERICAN UNION, a corporation, Appellant.	)	222 I.A. 653

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court in favor of the plaintiff, who is appellee here, on the finding of the court without a jury. The plaintiff, who was the beneficiary in a certain fraternal beneficiary certificate issued by defendant for the sum of $2,000, brought suit upon the certificate. Judgment was entered by the court for the amount of the certificate.

In her statement of claim plaintiff alleges that William F. Motzer entered into a contract of insurance with the defendant whereby, upon the performance of certain terms and conditions by him, the defendant would upon his death, pay to his beneficiary the sum of $2,000. The provisions of the certificate of insurance are partially set forth in the statement, from which it appears that the defendant agreed to pay to the beneficiary upon the receipt and approval of satisfactory proofs of the death of said William F. Motzer, the sum of $2,000, provided his membership be in full force and effect at the time of his death and that he had complied with all the laws, rules and regulations of the defendant corporation. It is further alleged that said insured complied with all the conditions, that he died on November 22, 1918, and that there was due to the plaintiff $2,000 on said certificate.

In its affidavit of merits defendant stated that

This is an appeal from a judgment of the Municipal Court in favor of the plaintiff, who is appellee here, on the finding of the court without a jury. The plaintiff, who was the beneficiary in a certain fraternal benefit association certificate issued by defendant for the sum of $5,000, brought suit upon the certificate. Judgment was entered by the court for the amount of the certificate.

In her statement of claim plaintiff alleges that William F. Rotner entered into a contract of insurance with the defendant charity, upon the performance of certain terms and conditions by him, the defendant would upon his death, pay to his beneficiary the sum of $5,000. The provisions of the certificate of insurance are practically set forth in the statement, from which it appears that the defendant agreed to pay to the beneficiary upon the receipt and approval of satisfactory proofs of the death of said William F. Rotner, the sum of $5,000, provided his membership in its full force and effect at the time of his death and that he had complied with all the laws, rules and regulations of the defendant association. It is further alleged that said insured complied with all the conditions, that on the 14th day of August, 1912, was duly sworn to the plaintiff $5,000 on said certificate.

In its affidavit of merits defendants stated that

the contract involved in the case was composed of the application for insurance, the by-laws of the defendant and the benefit certificate in question. These by-laws in part provide that a member of the order who in his medical examination or application for membership shall make, has made, or authorizes the making in his behalf of any false answer to any question propounded to him, or any false statement regarding his then or past physical condition, or who shall conceal or attempt to conceal the true facts regarding said matters, or either of them, or thereby acquires membership in the order, shall ipso facto thereby invalidate and nullify his membership, and neither he nor his beneficiary shall have or be entitled to any of the rights or benefits of membership in the order or under the certificate, and such false answer or statement shall be a good defense on the part of the defendant to any and all suits, claims or demands brought against the order, based upon the benefit certificate or by reason of his membership. The affidavit sets forth the following provision, which appears in the application of the insured, signed by him, to-wit:

> "I, the undersigned, for the purpose of securing membership in the North American Union, do hereby expressly warrant the truthfulness of each and all statements made by me herein, and of each statement and answer made by me to the questions propounded in my medical examination, or by the medical examiner, making such examination; and I do hereby further expressly consent and agree that each and all of said statements and answers shall form the basis of my membership therein and that any untrue or fraudulent statements or any evasive answers, or concealment or suppression of facts by me, whether the same or either of them are material or not in my application for membership, this agreement, my medical examination or to the medical examiner, * * * shall forfeit and absolutely determine, without any proceedings on the part of said association, or notice therefrom, all rights or interests, payments, benefits, and privileges of myself, my family heirs, dependents or the beneficiary or beneficiaries named in any benefit certificate which may hereafter be issued upon this agreement and my statements and medical examination."

the contract involved in the case was composed of the application for insurance, the by-laws of the defendant and the benefit certificate in question. These by-laws in part provide that a member of the order who is his medical examination or application for membership shall make, has made, or authorizes the making in his behalf of any false answer to any question propounded to him, or any false statement regarding his then or past physical condition, or who shall conceal or attempt to conceal the true facts regarding said matters, or either of them, or thereby acquires membership in the order, shall ipso facto thereby invalidate and nullify his membership, and neither he nor his beneficiary shall have or be entitled to any of the rights or benefits of membership in the order or under the certificate, and such false answer or statement shall be a good defense on the part of the defendant to any and all suits, claims or demands brought against the order, based upon the benefit certificate or by reason of his membership. The affidavit sets forth the following provisions, which appear in the application of the insured, signed by him, to-wit:

"I, the undersigned, for the purpose of securing membership in the Uniform American Union, do hereby expressly warrant the truthfulness of each and all statements made by me in the questions propounded in my medical examination, or by the medical examiner, making such examination; and I do hereby further expressly consent and agree that each and all of said statements and answers shall form the basis of my membership therein and that any untrue or fraudulent statements or any evasive answers, or concealment of suppression of facts by me, whether the same or either of them are material or not in my application for membership, this agreement, my medical examination or in the medical examiner, * * * shall forfeit and invalidate, without any proceedings on the part of said association, or unless thereafter, all rights or interests, payments, benefits, and privileges of myself, my family heirs, dependents or the beneficiary or beneficiaries named in my benefit certificate which may hereafter be issued upon this agreement, and my statements and medical examination."

It is also alleged in the affidavit of merits that the insured in answer to certain interrogatories set out in said application expressly stated that he had never had and never received any treatment for the disease of syphilis and that he did not know any facts or circumstances not therein stated relating to his physical condition, family or personal history, tending to shorten his life which were not distinctly therein set forth, and that he had last consulted a physician for any real or imaginary ailment fifteen years ago, and then for typhoid fever. At the conclusion of the interrogatories the following appears, signed by the applicant: "I hereby warrant the truthfulness of all the answers to the above questions."

The affidavit further alleged that the statements made by the insured at the time of his application as to his physical condition and medical treatment were false; that at the time of signing said application he had had various diseases, including syphilis, and his answers were known by him to be false and made for the purpose of deceiving the defendant; that the statements were material to the risk and the insured would not have been admitted to membership had he truthfully answered the said questions. The defendant by its affidavit of merits offered and tendered to plaintiff all moneys paid by the insured into the mortuary fund of the said decedent amounting to $300.

Upon the trial of the case plaintiff offered in evidence the benefit certificate and proofs of death. The latter showed that William P. Wetzer died November 22, 1913, at the Chicago State Hospital from general paralysis of the insane. He was then forty-six years of age. The duration of the disease was given as six years. His dues were paid at the time of his death.

On the part of the defense, the application of the insured, dated April 14, 1911, was received in evidence, also

It is also alleged in the affidavit of merits that the insured is answer to medical interrogatories and in his application erroneously stated that he had never had and never received any treatment for the disease of syphilis and that he did not have any fits or otherwise not therein stated relating to his physical condition. Finally or personal bias by sending to misrepresentation his life which were not statistically correct and that he had been convicted a felon for any and of Dangerous illness prior his, but then the insured died. At the conclusion of the interrogatories the following answers, signed by the applicant: "I hereby warrant the truthfulness of all the answers to the above questions."

The affidavit further alleges that the misrepresentations by the insured at the time of his application as to his physical condition and previous sickness were false; that at the time of signing said application he had had various diseases, including syphilis, and his answers were known by him to be false and made for the purpose of deceiving the defendant; that the diseases were material to the risk and the insured would not have been admitted to membership had he truthfully answered the said questions. The defense set by the affidavit of merits offered and received is identical all moneys paid by the insured into the mercury fund at the said insured according to law.

Upon the trial of the case plaintiff offered in evidence the insured certificate and proofs of death. The jurisdiction showed that William C. Parker died November 22, 1931, at the Chicago Cook County Hospital from advanced varicosis of the disease. He was then forty-two years of age. The certificate of the disease was given as his cause. His last visit paid to the time of his death.

On the part of the defense, the application of the insured, dated April 14, 1931, was received in evidence, also

the by-laws, including the portions above indicated. There was also received in evidence a certified copy of the verdict of jurors, finding Metzer insane in 1912 and committing him to the Elgin asylum. This verdict found that the insured was then suffering from maniac depressive insanity and that the disease was of four years duration.

Dr. R. N. Kershaw, a physician at the Chicago State Hospital, testified that in 1915, he made a physical examination of the insured, including a spinal puncture and a Wassermann test on the spinal fluid, which indicated that the insured had previously been afflicted with syphilis and that the patient was then suffering from paresis, and further testified that it requires at least five years for an infection of syphilis to develop paresis to the extent shown in the patient.

Dr. K. M. Manougian, a specialist in nervous diseases, formerly connected with the Chicago State Hospital at Dunning, and with the Psychopathic institution at Kankakee from 1912 to 1915, made a similar examination of the patient with the same results. This physician testified that it requires ten years to develop paresis after an infection with syphilis.

Dr. Henry J. Gahagan, Medical Superintendent of the Merciville Sanitarium at Aurora and formerly Assistant Superintendent at the Elgin State Hospital, testified that he knew the insured while the latter was a patient at Elgin and recalled him because the patient caused considerable trouble, being very violent. Other physicians testified that in their judgment the insured had paresis as a result of syphilitic infection at the time he was sent to Elgin in 1912, and that he had been afflicted for many years prior to 1912.

In view of this testimony, which is practically undisputed, we cannot escape the conclusion that the insured was afflicted with syphilis at the time he made his application for

the [illegible], including the previous three indicated. They were also received in evidence a certified copy of the wedding of Jarvis, finding Motor Insane in 1912 and committing him to the Elgin Asylum. This verdict found that the insured was then suffering from senile [illegible] and that his disease was of four years duration.

Dr. [illegible], a physician in the Jersey City Hospital, testified that in 1918, he made a physical examination of the insured, including a spinal puncture and a Wassermann test on the spinal fluid, which indicated that the insured had previously been afflicted with syphilis and that the patient was then suffering from paresis, and further testified that it requires at least five years for an infection of syphilis to merely develop to the extent shown in the patient.

Dr. E. B. Monnugle, a specialist in nervous diseases, formerly associated with the Illinois State Hospital in Chicago, and with the Psychopathic Institution at Tuskegee from 1912 to 1917, made a special examination of the patient with the same results. This physician testified that it requires ten years to develop paresis after an infection with syphilis.

Dr. Henry J. Gideon, Medical Superintendent of the Universal Institute of Neurology and Formerly Medical Superintendent at the Elgin State Hospital, testified that he knew the insured while the latter was a patient at Elgin and recalled his become the patient manifest paresis, being very violent. Other physicians testified that in their judgment the insured had paresis as a result of syphilitic infection at the time he was sent to Elgin in 1912, and that he had been afflicted for many years prior to 1912.

In view of this testimony, which is practically undisputed, we cannot escape the conclusion that the insured was afflicted with syphilis at the time he made his application for insurance.

membership in the North American Union on April 14, 1911. It seems probable that he must have known this fact, although it is difficult to demonstrate that he had such knowledge. The testimony of his sister to the effect that he had admitted that he was afflicted with this disease is entitled to some consideration, but owing to the lapse of time since the oral statements were alleged to have been made by him, and to the uncertainty which is always attached to testimony of this character, these admissions cannot be regarded as conclusive evidence that the insured knew that he was afflicted with the disease. A material misrepresentation, whether made with knowledge of its falsity or through mistake, prevents a recovery. Lewis v. Royal League, 215 Ill. App., 215.

All of the questions necessary to determine in this case have been decided by the Supreme Court of this state in a number of cases which it is unnecessary for us to review at great length. The application for the certificate, the medical examination, the by-laws of the society and the certificate itself, together with the statute governing fraternal insurance organizations, must be considered as the contract between the parties and their meaning and construction were questions for the court. Lehman v. Clark, 174 Ill., 279; Fullenwider v. Royal League, 180 Ill., 621. There is some discussion between counsel as to the construction of the contract as to whether the false answer was a warranty of a fact, which under the law must be literally true, whether material or not, or was merely a representation of a fact which must relate to a matter material to the risk. In any view which may be taken of this subject, the questions and answers above indicated were material to the risk. There is no ambiguity about the contract which would permit a construction giving a right to recover. Enright v.

Knights of Security, 253 Ill., 460. The answers given by the insured in application to the questions hereinbefore noted were untrue. They were material to the risk, and under the express provisions of the benefit certificate and the by-laws of the defendant, we are obliged to find that the plaintiff was not entitled to recover any sum on said certificate. Crosse v. Knights of Honor, 254 Ill., 80. These authorities and the decisions upon which they were based, all of which were cited and relied upon by the court, are conclusive upon all questions involved herein.

The judgment of the Municipal Court is reversed with a finding of facts.

REVERSED WITH FINDINGS OF FACTS.

Gridley, P. J., and Barnes, J., concur.

Knights of Honor, 188 Ill., 480. The answers given by the insured in amplification to the questions hereinbefore noted were untrue. They were material to the risk, and under the express provisions of the benefit certificate and the by-laws of the defendant, we are obliged to find that the plaintiff was not entitled to recover any sum on said certificate. Greene v. Knights of Honor, 188 Ill., 80. These authorities and the decisions upon which they were based, all of which were other and public laws by the court, are conclusive upon all questions involved herein.

The judgment of the Municipal Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Dadlay, P.J., and Burke, J., concur.

295 - 26469

FINDING OF FACTS.

We find as ultimate facts in this case that the deceased, William P. Metzer, in his application for membership in the North American Union, made false statements therein and that said false statements were material to the risk.

374 - 26542

WILLIAM GUENTHER, sole trader, trading under the names of Guenther Transfer & Supply Co. and Guenther Transfer & Coal Co., Appellee,

vs.

JOHN A. MILLER, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 653

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court on a directed verdict in favor of the appellee and against appellant in the sum of $258.10. Appellee is a resident of Appleton, Wisconsin, who brought suit in the Municipal Court of Chicago for the sum of $258.10 for merchandise sold to appellant, being one carload of cabbages containing 25,810 pounds at $20 per ton f.o.b. Appleton, shipped December 14, 1918.

Appellant by his affidavit of merits admitted the purchase by him of the cabbages for the sum above stated and that he had not paid for the same. He alleged that he had a set-off or counter-claim in the sum of $280, charging that on January 22, 1919, he had purchased another carload of cabbages from appellee at $20 per ton f.o.b. Appleton, Wisconsin, to be shipped immediately. He charged that appellee had failed to deliver the same and that appellant had thereby sustained damages in the sum of $280, and that there was due to appellant, after crediting appellee with the sum of $258.10 claimed in his statement of claim, the net sum of $21.90.

When the case came on for trial before the Municipal Court it was ordered that appellant's claim of set-off be stricken from the files, which was allowed, and thereupon counsel were directed to proceed with the trial. Thereafter the court, without hearing any evidence whatever, instructed the jury to

MR. JUSTICE MARSHALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the municipal court on a directed verdict in favor of the appellee and against appellant in the sum of $880.12. Appellee is a resident of Appleton, Wisconsin, who brought suit in the municipal court of Chicago for the sum of $2,[illegible] for merchandise sold to appellant, being one carload of sorghum containing 38,[illegible] pounds at $[illegible] per ton f.o.b. Appleton, shipped December 14, 1[illegible].

Appellant by his affidavit of merits admitted the purchase by him of the sorghum for the sum whereof stated and that he had not paid for the same. He alleged that he had a set-off or counter-claim in the sum of $880, according that on January 24, 1917, he had purchased another carload of sorghum from appellee at $[illegible] per ton f.o.b. Appleton, Wisconsin, to be shipped immediately. He charged that appellee had failed to deliver the same and that appellant had thereby sustained damage in the sum of $880, and that there was due to appellant, after crediting appellee with the sum of $[illegible] claimed in his statement of claim, the net sum of $[illegible].

Upon the case come on for trial before the municipal court it was ordered that appellant's claim of set-off be stricken from the files, which was allowed, and thereupon judgment was directed in favor of the plaintiff. Thereafter the court, without hearing any evidence whatever, instructed the jury to

find the issues for appellee in the sum of $258.10. The jury returned a verdict in conformity with this instruction, and thereupon judgment was entered on the verdict, from which an appeal is prayed to this court.

Plaintiff was a non-resident. Therefore defendant was entitled to file his claim of set-off for unliquidated damages and to a trial upon the merits. While it is true as a general rule that a demand for unliquidated damages cannot be the subject of a claim of set-off, yet it is well established by decisions of this court that an exception exists in a case where the plaintiff is a non-resident. There was a running account between the parties to this suit and it would be unjust to allow the plaintiff to invoke the aid of the courts of this state to permit him to select some item of the account in his favor, bring suit on it in this state and at the same time refuse to permit the defendant to make his defense, thereby compelling him to go to plaintiff's domicile to sue for the items due to the defendant on his account. Ideal Coated Paper Co. v. Cupples Envelope Co., 169 Ill. App., 484; Nissly v. Weiner, 211 Ill. App., 254.

The judgment of the Municipal Court is reversed and the case remanded with directions to vacate the order striking appellant's set-off and to submit to the jury the evidence offered under said claim of set-off.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Barnes, J., concur.

find the issues for appellee in the sum of $[illegible]. The jury rendered a verdict in conformity with the instruction, and interposes [illegible] in the verdict. The motion for a nonsuit is proper to this court.

Plaintiff was a non-resident. Therefore defendant was entitled to file his claim of set-off for until adjudication damages and be a total loss. While it is true as a general rule that a demand for unliquidated damages cannot be the subject of a claim of set-off, yet it is well established by decisions of this court that an actionable claim in a case where the liability is a non-contract. [illegible] between the parties to this suit and it would be unjust to allow the plaintiff to invoke the aid of the courts of this state to permit him to select some item of the account in his favor, being suit on it in this state and if the same time refuse to permit the defendant to make his defense, thereby compelling him to go to plaintiff's domicile to use for the same use in the defendant on his account. [illegible] v. [illegible] 109 Ill. App., 464; Kinsey v. [illegible] 101 Ill. App., 581.

The judgment of the municipal court is reversed and the cause remanded with directions to vacate the order sustaining appellee's set-off and to submit to the jury the evidence offered under said claim of set-off.

[illegible]

Affirmed, [illegible] and remanded.

393 - 26567.

THE WESTERN METALS CO., a corporation, Appellee,	APPEAL FROM
vs.	SUPERIOR COURT,
HARTMAN INGOT METAL CO., a corporation, Appellant.	COOK COUNTY.

222 I.A. 654

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

An action in assumpsit for breach of an alleged oral contract of sale was brought in the Superior Court of Cook County by appellee, who was plaintiff in that court, and resulted in a judgment of $4500 in favor of the plaintiff. The material claimed to have been sold was fifty tons of scrap brass of two different varieties. Plaintiff is an Ohio corporation doing business in the City of Cleveland as a dealer in scrap metal. Defendant is an Illinois corporation doing business in Chicago and engaged in the manufacture of ingot brass.

The declaration alleges in substance that defendant purchased from plaintiff in Cleveland on November 8, 1918, the said merchandise consisting of twenty-five tons of red brass borings at twenty cents per pound and twenty-five tons of clean light brass at thirteen cents per pound, which were to be delivered in Chicago prior to January 31, 1919, and to be paid for within thirty days after delivery; that plaintiff was ready and willing to deliver the material and tendered and offered to deliver the same and that defendant would not accept it, whereby plaintiff was deprived of his profit in the transaction; that at the time defendant refused to accept the merchandise the market price was less than the contract price; that defendant wrongfully notified plaintiff before the time agreed upon for performance on its part that it would not accept the merchandise and that

on or about January 7, 1919, defendant wholly refused to accept delivery of the material or any part of it.

The defendant filed a plea of the general issue and two special pleas setting up the statute of frauds relating to the sale of personal property under the Uniform Sales Acts of Ohio and Illinois respectively. It was agreed by counsel that the statute of frauds relating to the sale of personal property in Ohio and Illinois are identical, except that in the former its provisions only apply to a contract of sale or a sale of any merchandise of the value of $2500, while in Illinois a value of $500 is within the statute. The value of the goods in question was greatly in excess of $2500, so that no question was raised as to which statute should be held applicable.

The evidence shows that the presidents of the respective companies who are parties to this suit met casually in the office of a third party in Cleveland, Ohio, on November 8, 1918. At that time and place the subject-matter of the alleged sale was discussed. The president of the plaintiff company gives his version of the conversation, which is to the effect that he would sell the merchandise above mentioned to be delivered in Chicago and that the president of the defendant company agreed to pay the prices specified and agreed that the plaintiff should be allowed until January 31, 1919, to make the shipment. The president of the defendant company testified that he had the conversation at the time and place above stated and that the president of the plaintiff company then offered to sell him the merchandise in question, to which the president of the defendant company replied in substance that he had been purchasing very heavily at that time in Cleveland and would advise plaintiff after January 1st whether or not he wanted any of the material and that nothing was said as to terms or as to when shipment was to be made, and that he had never been in the office

on or about January 9, 1919, defendant wrongly refused to accept delivery of the merchandise or any part of it.

The defendant files a plea of the general issue and two special pleas setting up the statute of frauds relating to the sale of personal property under the Uniform Sales Acts of Ohio and Illinois respectively. It was agreed by counsel that the statute of frauds relating to the sale of personal property in Ohio and Illinois are identical, except that in the former the provisions only apply to a contract of sale, or a sale of any mercHandise of the value of $500, while in Illinois a value of $100 is within the statute. The value of the goods in question was usually in excess of $500, so that no question was raised as to which statute should be said applicable.

The evidence shows that the presidents of the respective companies who are parties to this suit met generally in the office of a third party in Cleveland, Ohio, on December 3, 1918, at that time and place the subject-matter of the alleged sale was discussed. The president of the plaintiff company gives his version of the conversation, which is to the effect that he would sell the merchandise above mentioned to be delivered in Chicago and that the president of the defendant company agreed to pay the prices specified and agreed that the plaintiff should be allowed until January 1, 1919, to make the delivery. The president of the defendant company gives his version of the conversation, which is to the effect that he would sell the merchandise above mentioned to be delivered in Chicago and that the president of the defendant company agreed to pay the prices specified and agreed that the plaintiff should be allowed until January 1, 1919, to make the delivery. The president of the defendant company testifies that he did not use the expressions in the plaintiff's letter above stated and that his transaction of the plaintiff company was that he would sell the merchandise to be delivered in Chicago, in which the president of the defendant company replied he would buy the merchandise, but that he thought it was very doubtful if the plaintiff company would be able to make the delivery, in which the president of the defendant company replied he would take the chance, and that the plaintiff company finally at that time he believed and would rely upon plaintiff's letter. However, let whether or not he actually did so, the material and the material and that he would be able to make the delivery, and that he had every reason to believe that the plaintiff would be able to make the delivery, and that the attitude

of the Western Metals Company, the plaintiff.

In addition to this oral evidence, certain correspondence between the parties was received in evidence, consisting of a document mailed by plaintiff to defendant, which is called a confirmation. It is printed upon the stationery of plaintiff and purports to set forth the quantity and kind of material sold, the price for the same and the terms of payment. This document was received by defendant on November 8, 1919, and a reply was sent by the secretary to the president of the defendant company, the president being absent, stating that defendant absolutely refused to accept any shipment of metals until such time as plaintiff might be notified to the contrary, owing to the fact that defendant was badly congested at that time. The subsequent correspondence consists of a letter from plaintiff to defendant asking for shipping instructions, written on November 11, 1918, and a similar letter on December 4, 1918. The receipt of the latter letter was acknowledged by defendant, who again wrote absolutely refusing to accept any metals until plaintiff should be advised to the contrary. Another letter was written by defendant on December 6, 1918, repeating the former general instructions to withhold all shipments until otherwise directed. There are a number of other letters shown in the record which are of substantially the same character as those above mentioned, culminating in a letter of January 7, 1919, from defendant to plaintiff, notifying plaintiff that defendant was cancelling all written orders which it had previously given.

Assuming that there was originally a valid contract of sale between the parties, which seems to be the conclusion reached by the jury, the important question remains for determination whether or not the contract was in violation of section 4 of the Uniform Sales Act, which provides as follows:-

"A contract of sale, or a sale of any goods or choses in action, of the value of $500 or upwards, shall not be enforceable

by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold, and actually receive the same or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract of sale be signed by the party to be charged or his agent in that behalf."

It is contended by appellee that the correspondence to which reference has been made constituted such a memorandum as is contemplated by the statute of frauds.

While it is doubtless true, as urged by appellee, that an admission in writing that the contract or order was given is sufficient to satisfy the requirements of the statute of frauds, yet it is also unquestionably the law that a memorandum relied upon must state the contract with such certainty that its essentials can be known from the memorandum or by some reference contained in it to some other writing without recourse to parol proof to supply them. Williston on Sales, section 102-104. The necessity that there be a signature to the memorandum by the party to be charged or his agent in that behalf is also recognized as indispensable. Williston on Sales, section 115. It seems plain that the correspondence offered in evidence does not comply with these requirements. We are therefore obliged to hold that the alleged contract upon which this action is based is prohibited by the provision of the Uniform Sales Act above mentioned, and consequently cannot be enforced by action. This view of the case renders it unnecessary to discuss other questions raised by counsel for appellant.

The judgment of the Superior Court is reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

by either belief the court should always pass on the merits of the claim chosen in action an contractor to be left, or void, and consequently remedy the case or else specially is already to have the contract or in part payment, or without some role or contribution in matters of the contract or role by claims or the party to be charged or his agent in that behalf.

It is contended by appellee that the correspondence to which reference has been made constituted such a memorandum as is contemplated by the statute of frauds.

While it is doubtless true, as urged by appellee, that an admission in writing that the contract or order was given is sufficient to satisfy the requirements of the statute of frauds, yet it is also unquestionably the law that a memorandum relied upon must state the contract with such certainty that its essential can be known from the memorandum or by some reference contained in it to some other writing without resorting to parol proof to supply them. Utilizing an case, supra (in-fine) the court say that there be a signature to the memorandum by the party to be charged or his agent to that effect is also considered an indispensable. Utilizing an case, supra (in). It seems plain that the correspondence relied on evidence has not sufficient certainty requirements. In the instrument relied to make such the "letter contract upon which this action is based is predicated by the provision of the Indian Sales Act above mentioned, and consequently cannot be enforced in action. This view is the more readily is unnecessary to discuss other questions raised on account for appellant.

The judgment of the Superior Court is reversed.

[illegible]

[illegible]

405 - 26579.

HARRY AYERS, Appellant,	)	ERROR TO
vs.	)	CIRCUIT COURT,
EDWARD REW, Appellee.	)	COOK COUNTY.

222 I.A. 654

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an action of replevin brought by appellant, who was plaintiff in the Circuit Court, to recover possession of a certain diamond ring of the alleged value of $1500. The ring in question was taken by the sheriff under the replevin writ and delivered to the plaintiff. The declaration is in the usual form and need not be set forth in detail. A plea of the general issue was filed, also a plea denying the taking of the ring and a plea alleging that the ring was the property of one Lee Kirchen. There was a jury trial resulting in a verdict and finding that the right to the possession of the property in question was in the defendant. A motion for a new trial was denied and judgment entered on the verdict. A reversal is now sought upon the ground that the court erred in allowing certain cross examination of plaintiff and for the reason that the verdict was manifestly contrary to the weight of the evidence.

In the view we take of the case it will not be necessary to discuss the alleged errors of the trial court in connection with the cross examination of the plaintiff. The evidence shows that the plaintiff being the owner of and in possession of the ring loaned it to said Lee Kirchen at her request, she having expressed a desire to wear it on a vacation trip of a few days to Wisconsin. She promised to return the ring to plaintiff upon her return to Chicago the following week. There was some attempt

to sustain the theory that plaintiff gave the ring to the lady as an engagement ring, but it is admitted that the ring in question was a man's ring and not adapted for engagement purposes.

Miss Kirchen failed to return the ring as promised. She testified that in conversations which the plaintiff had with her subsequent to her return to Chicago, in which plaintiff requested the return of the ring to him, she explicitly stated that she did not want the ring, and seemed to admit plaintiff's right to it. The ring was next seen in a pawn shop in the possession of the defendant. There is much evidence in the case having no apparent connection with the ownership of the ring which we deem unnecessary to discuss in detail. It is undisputed that the ring in the first instance was the property of plaintiff, and in view of Miss Kirchen's disclaimer of any wish to retain it, there is no apparent reason why plaintiff is not entitled to the immediate possession of the ring. We are of the opinion that the verdict of the jury was manifestly contrary to the weight of the evidence.

The judgment of the Circuit Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Gridley, P. J., and Barnes, J., concur.

to sustain the theory that plaintiff gave the ring to the lady as an engagement ring, but it is admitted that the ring in question was a man's ring and not adapted for engagement purposes.

Mrs. Hughes failed to return the ring at plaintiff's request.

The testimony that in conversations with the plaintiff had with her subsequent to her return to Chicago, in which plaintiff requested the return of the ring to him, she emphatically stated that she did not want the ring, and wanted to admit plaintiff's right to it. The ring was kept upon in a pawn shop in the possession of the defendant. There is much evidence in the case having no apparent connection with the ownership of the ring which we deem unnecessary to discuss in detail. It is undisputed that the ring in the first instance was the property of plaintiff, and in view of Miss Hughes's disclaimer of any claim to retain it, there is no apparent reason why plaintiff is not entitled to the immediate possession of the ring. We are of the opinion that the verdict of the jury was manifestly contrary to the weight of the evidence.

The judgment of the District Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

BRADLEY, C. J., and BRIGHT, J., concur.

FINDING OF FACT.

We find as an ultimate fact in this case that the ring in question is the property of the plaintiff.

81 - 26734

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ALMA ROWENS,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 654

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was convicted in the Municipal Court of Chicago on a charge of larceny of goods owned by Carson, Pirie, Scott & Company. A reversal of this judgment is now sought. The case was heard before the court without a jury. The record contains no bill of exceptions.

It is urged as a ground for reversal that the information was fatally defective and did not charge the defendant with larceny but with the intent to commit larceny. We see no merit in this contention. The information charges that the defendant did "take, steal and carry away with intent to steal the following merchandise," and that she did then and there wrongfully and unlawfully steal, take and carry away the said merchandise contrary to the statute. There is no uncertainty about the charge, and therefore no merit in this contention.

Plaintiff in error's second assignment of error is that the finding of the court as to the value of the property stolen is insufficient. The record shows that the court found the defendant guilty in manner and form as charged in the information, value of property $12, and it was considered and adjudged by the court that the defendant was guilty of larceny of the property of the value of $12 on said finding of guilty. We are of the opinion that the finding of the court, although

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Plaintiff in error's second contention of error is that the finding of the court as to the value of the property stolen is insufficient. The record shows that the court found the defendant guilty in manner and form as charged in the information, value of property $25, and it was considered and adjudged by the court that the defendant was guilty of larceny of the property of the value of $25 as said finding of guilty. In are of the opinion that the finding of the court, although

it may have been inartificial, was sufficient. People v. Tuhl, 211 Ill. App., 377.

It is also urged on behalf of plaintiff in error that the goods and chattels stolen were owned by a corporation and that the information does not show on its face that it was sworn to by an officer of the corporation or its authorized agent. It is sufficient to say, with reference to this point, that it must be presumed the trial judge complied with the provisions of sec. 27 of the Municipal Court Act at the time the information was executed before him, examined the informant and ascertained his authority. The certificate signed by the judge to whom the information was presented indicates that this course was pursued.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

36 - 25795

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

WILLIAM MOFFAT,
Plaintiff in Error.

ERROR TO
CRIMINAL COURT
OF CHICAGO.

222 I.A. 654

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

An information was filed against the defendant, William Moffat, charging him with being a vagabond. He pleaded not guilty and after a trial before the court without a jury was found guilty and sentenced to three months in the House of Correction. To reverse this judgment he has sued out this writ of error.

The information charged that the defendant "was an idle and dissolute person and was habitually neglectful of his employment, * * * did not lawfully provide for himself and neglected all lawful business" and misspent his time without giving a good account of himself. It further charged that defendant was known to be a pickpocket and was habitually found prowling in and loitering about public places all in violation of sec. 270, ch. 38, R.S.

From the evidence it appears that defendant was arrested by a police officer October 3d as he was boarding a street car at Chicago avenue and Halsted street. It was about 5 o'clock in the evening and the car was crowded. With defendant was one McCune. A police officer testified that McCune was a pickpocket; that at the time of the arrest

the defendant told the police officer that he was working for his brother as a bartender in a saloon at 612 N. Clark street; that the officer, after the arrest and before the trial, investigated and found that what defendant had said at the time of the arrest, viz: that he was working for his brother as a bartender, was true, the officer having called at the saloon. Another police officer testified that he had known the defendant ten or eleven months and had arrested him about a year prior in company with a man named Brown; that Brown was a burglar, although he had not known Brown before the time of the arrest. At that time the officer asked defendant what he was doing and the latter stated he was going through town and stopped off to see his brother. Another police officer testified that he had known the defendant about two years and at one time had arrested him when he was standing on the corner talking with another man; that defendant at that time was charged with disorderly conduct. This was all the evidence offered by the People.

On behalf of defendant evidence was offered tending to show that he had been working for his brother as a bartender, his hours being from 5 A.M. until 3 P.M.; that on the day in question after finishing his day's work he called on some friends on the North side and at the time of the arrest was going to visit someone else on the West side. Other evidence was introduced tending to support defendant in his testimony that he had been working for his brother.

Sec. 270, ch. 38, R.S., which defendant was charged with violating, defines vagabonds to be "all persons who are idle and dissolute and who neglect all lawful business and who do not give a good account of themselves; and all persons who

are known to be thieves, burglars or pickpockets and have no lawful means of support."

The evidence fails to show that the defendant was an idle or dissolute person, for we think it clearly appears that he was working for his brother. There is also lack of evidence tending in any manner to show that he was a burglar or pickpocket as charged in the information, so that the only contention that can possibly be made why the judgment should be sustained is that the defendant was engaged in an unlawful business. And without deciding, since it is not argued, whether a person engaged in an unlawful business would be a vagabond within the meaning of the statute, we think we would not be justified in holding that the defendant was engaged in the violation of the prohibition laws of the State or of the nation simply because the evidence shows that his employment was that of a bartender, there being no evidence of the particular nature of the work defendant was engaged in doing.

The judgment of the Municipal Court of Chicago is reversed.

REVERSED.

THOMSON and TAYLOR, JJ CONCUR.

153 - 25924

WILLIAM ANDERSON, a minor, by
Christ Anderson, his next friend,

Appellee,

v.

SAMUEL T. KYLE,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 654

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

William Anderson, a minor about 12 years of age, by his next friend brought suit against Samuel T. Kyle to recover damages for personal injuries. There was a verdict and judgment in his favor to $1,000 to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff lived with his parents on Campbell avenue, a north and south street, a little more than a block north of Washington Boulevard, an east and west street; that about 2 o'clock in the afternoon of July 31, 1918, a fire alarm was sounded and a fire company which was located at the southwest corner of Barren and Campbell avenues (one block south of Washington Boulevard) came into Campbell avenue and proceeded south on Campbell avenue to Madison street and then turned west on its way to the fire. Plaintiff jumped on his bicycle and started to the fire proceeding along the west side of Campbell avenue. As he was crossing Washington Boulevard his bicycle collided with defendant's automobile which was being driven west on Washington Boulevard and as a result plaintiff was injured.

Plaintiff's theory was that when he reached a point about three feet north of the roadway of Washington boulevard he stopped his bicycle and looked east and west in the boulevard to ascertain whether it was safe for him to cross; that upon looking to the east he saw defendant driving his automobile west on the north side of the roadway of Washington boulevard; that when he first observed the automobile it was about 250 feet east of Campbell avenue traveling west at about 12 or 15 miles per hour. At that time plaintiff proceeded south across the boulevard; that when he reached about the middle of the roadway of that street he discovered that the defendant's automobile was almost upon him; that he then endeavored to increase his speed but the defendant turned his automobile to the south, struck the bicycle and before the automobile could be stopped it ran up onto the curb of Washington boulevard west of Campbell avenue; that as a result of this collision plaintiff was injured. Since there is no contention that the damages are excessive it will be unnecessary to specify the nature of plaintiff's injuries.

On the other hand, defendant's theory of the case was that he was driving his automobile west on Washington boulevard at about 12 miles per hour in the north half of the roadway of that street; that he saw plaintiff riding his bicycle south on the west side of Campbell avenue and north of the boulevard; that plaintiff did not stop when he reached the roadway of the boulevard but turned west along the north curb some 12 or 15 feet and then apparently changed his mind and suddenly turned south across the roadway of the boulevard and in front of defendant's automobile; that the defendant in an endeavor to avoid a collision turned his automobile sharply

to the south but by reason of the sudden turning of plaintiff's bicycle it was impossible to avoid the collision.

Plaintiff was the only witness produced on his behalf as to how the accident occurred and his testimony tended to support his contention. The defendant and the owner of a garage located at the northwest corner of Washington boulevard and Campbell avenue, gave testimony supporting defendant's version of the matter. Defendant's testimony was in the form of a deposition he having removed from Chicago to California. The defendant further testified that when the boy turned the bicycle in front of the automobile "he seemed to rise in his seat and exert himself in crossing quicker"; that immediately after the accident he helped pick the boy up and the boy said to him at that time that "his brakes did not hold" and he further said, "Mister, Mister, it wasn't your fault."

Counsel for plaintiff argues that it appears from the evidence that defendant was negligent for the reason that he turned sharply to the south to pass around in front of the boy's bicycle when he should have continued straight ahead in which event he would have passed behind the bicycle and no collision would have occurred. In support of this he contends that the automobile was 250 feet east of Campbell avenue and, therefore, when the boy started to cross the boulevard after he had stopped at the northwest corner of the street intersection, the automobile was 250 feet plus the width of Campbell avenue from the boy and that from this it is clear that if the automobile continued straight west in the roadway it would have passed behind the bicycle. We have often found that where there is a collision between moving vehicles the testimony of witnesses as to the distance between the vehicles prior to the accident

and the rate of speed at which they were traveling is exceedingly inaccurate and very unreliable, and we are not at all disposed to agree with plaintiff's counsel that the accident occurred as he contends. For it would be most unusual that an automobile driven at the rate of 12 or 15 miles per hour in broad daylight on a good roadway nearly 300 feet from the path of the bicycle would be suddenly swerved to the south in place of proceeding straight west. We are also of the opinion that the jury might well have doubted the reliability of defendant's testimony since he testified that immediately after plaintiff was injured he said his brakes would not work, when it is clearly apparent that there would be no need of brakes under the circumstances disclosed by the evidence, and since the defendant further testified that at the time the boy said it wasn't defendant's fault. And while the verdict might have been different had the responsibility been ours, yet upon a careful consideration of all the evidence we are constrained to say that we are unable to hold that the verdict is so manifestly against the weight of the evidence as to warrant a reversal.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, J. CONCURS.
TAYLOR, J. DISSENTS.

174 - 23946

MAC LEAN CONSTRUCTION CO., a corporation, Appellant, v. UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, THE KALAMAZOO GRAVEL AND SAND COMPANY, a corporation, and SAMUEL L. SHEETS, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 655

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

The MacLean Construction Company brought suit against the Kalamazoo Gravel and Sand Company and Samuel L. Sheets as principals, and the United States Fidelity and Guaranty Company, as surety, on a contract bond given by defendants to insure the faithful performance, by the principals in the bond, of a certain contract to furnish sand and gravel to the plaintiff. The defendant surety company filed a set-off claiming a balance due the Kalamazoo Company and Sheets for sand and gravel shipped to and accepted by the plaintiff under the contract. There was a verdict and judgment in plaintiff's favor in debt for the sum of $10,000, the penalty of the bond, and damages in the sum of $2727.38, the debt to be discharged upon payment of the damages. Plaintiff being dissatisfied with the judgment prosecutes this appeal. The surety company alone followed the appeal to this court.

The record discloses that plaintiff had a contract to furnish material and construct a building in Detroit, Mich.; that inthe prosecution of the work it required sand

and gravel, and a contract was entered into between it and Sheets and the Kalamazoo Company whereby the latter two agreed to furnish plaintiff its requirements of sand and gravel, estimated at 21,000 cubic yards, of a certain kind for an agreed consideration. The contract further provided the time within which the sand and gravel was to be delivered and that in case of delay occasioned by a shortage of cars no damages could be claimed by plaintiff. And should there be any negligence or delay on the part of the railroad company, plaintiff was authorized to purchase other sand and gravel to be used by it in the construction of the building and such amount, if any, was to be deducted from the 21,000 cubic yards which was to be furnished plaintiff. There was a further provision that if the material was not furnished in accordance with the contract by reason of any default of the principals in the bond, then plaintiff, upon three days written notice, could purchase the necessary material in the open market and charge any excess cost to the principals in the bond. It was further agreed between the parties to the contract that plaintiff was to loan $6,000 to the Kalamazoo Company and Sheets to enable them to proceed with the performance of the contract, and as evidence of such indebtedness, but not in payment thereof, the latter two were to execute a promissory note for $6,000, payable on or before July 1, 1917, with interest at 5%, and "when the seller shall have delivered sufficient sand and gravel under the terms of this agreement to pay the principal and accrued interest on this note * * * the same shall be canceled and surrendered to the seller." The contract further provided for the execution of the bond on which this suit was brought. The $6,000 was loaned or advanced, the note made and delivered and the Kalamazoo Company and Sheets proceeded to deliver the sand

and gravel. Almost from the first they were in default in the shipments and complaint was made as to the quality of the material furnished. Plaintiff purchased in the open market material to be mixed with the sand and gravel that was delivered in order to make it usable and meet the contract requirements. The Kalamazoo Company and Sheets failed to furnish the entire 21,000 cubic yards and plaintiff was compelled to purchase in the open market sand and gravel from other sources. After giving credit for the material furnished plaintiff claims that there is a balance due it on account of the default of the Kalamazoo Company and Sheets of $11,904, to recover which sum this suit was brought.

Plaintiff's claim is made up of three items: (1) $6,000 advanced; (2) material purchased by it to be mixed with sand and gravel furnished to make the latter conform to the contract at a cost of $4564; and (3) the purchase by plaintiff of additional sand and gravel to complete the contract at an excess cost over the contract price of $3182, making a total of $13,747. From this plaintiff deducts the amount it owes for sand and gravel delivered, $1843, leaving a balance of $11,904.

Plaintiff's position is that under the undisputed evidence in the case it was entitled to the full amount of its claim and, therefore, the verdict is not based on the evidence. As near as we can determine the jury, by their verdict, allowed plaintiff for the second item only, although not to the full amount of that item. The surety company's position here is that under the evidence the verdict should have been for the defendants, but it does not seek a reversal of the judgment.

The record is voluminous and numerous points have been urged by both sides, but since we have reached the conclusion that a new trial must be had, we shall consider only what we

deem necessary in stating the reasons for our conclusion.

FIRST. As to the $6,000 item the evidence tends to show that the Kalamazoo Company was inneed of funds before it could proceed with the shipment of sand and gravel and that plaintiff agreed to loan or advance this sum for this purpose; that as the Kalamazoo Company shipped material it was to be credited with the contract price of such sand and gravel and this amount charged against the $6,000. The money was paid by check of the Beatrice Creamery Company dated January 11, 1917, payable to the plaintiff and by it endorsed and delivered to the Kalamazoo Company. Plaintiff sent the check with a letter to the Kalamazoo Company. The check was paid and the money received by the latter. The note was drawn by the Kalamazoo Company to the Beatrice Company and delivered to plaintiff by the maker. On January 15, 1917, plaintiff acknowledged receipt of the note by letter, stating:

> "We enclose herewith your note dated January 9, 1917, in the amount of $6,000, payable to the Fort Dearborn National Bank of Chicago.
>
> We beg to acknowledge receipt of your note in the amount of $6,000.00 made payable to the Beatrice Creamery Company. We are receiving this note as the one described in the contract for sand and gravel for the building of G.M. Haskell now in the process of erection in Detroit, Michigan, and waive the form of the note which should have been drawn direct to us, as described in the contract.
>
> Thanking you for your attention to this matter, we are
>
> Yours very truly,
> MacLean Construction Co.
> Hugh MacLean.
>
> Have you an approval from the bonding company yet?"

When the Kalamazoo Company received the $6,000 check January 11, 1917, it delivered to plaintiff the following receipt:

been necessary in arriving the reverse for our conclusion.

[illegible]. As to the $6,[illegible] also the evidence serve to show that the Salmesse Company was issued at least [illegible] it would consume with the subject at most our issues and that plaintiff agreed by loan or advance into one for this purpose; since as the Salmesse Company although [illegible] was to be credited with the contract price of such sums and general and this amount charged against the $6,[illegible]. The money was paid by check of his Jackson Trust[illegible] dated January 13, 1917, payable to Jos. [illegible] and by it endorsed and delivered to the Salmesse Company. Plaintiff sent the check with a letter to the Salmesse Company. The check was paid and the money received by the Jackson. The note was drawn by the Salmesse Company to the Detroit Company and delivered to plaintiff by the maker. On January 15, 1917, plaintiff acknowledged receipt of the note by letter, stating:

> "The enclosed herewith your note dated January 8, 1917, in the amount of $6,[illegible], payable to the Port Huron National Bank of Michigan.
>
> We beg to acknowledge receipt of your note in the amount of $6,[illegible] made payable to the Detroit Trust Company. We are transferring this note as the security therein is in contract for sand and gravel for the building of U.S. Shell [illegible] at Port Huron of erection in Detroit, Michigan, and note the form of the note which should have been drawn direct to us, as described in the contract.
>
> Thanking you for your attention to this matter, we are
>
> Very truly yours,
>
> Michigan Construction Co.
>
> Jos. Jackson.
>
> Have you an account from the Detroit company yet?"

Then the Salmesse Company received the $6,[illegible] dated January 15, 1917, it delivered to plaintiff the following receipt:

"RECEIVED from MacLean Construction Company Six thousand Dollars (which amount is also covered by promissory note to Beatrice Creamery Company of Chicago, Illinois, and due July 1, 1917). Advanced and to apply on account of contract dated December 22, 1916, for sand and gravel to be delivered to Detroit, Mich."

On trial the note was produced by plaintiff and was afterwards received in evidence.

Defendant contends that plaintiff cannot predicate any liability on the loan or advance of $6,000 for the reason that the conditions of the bond do not cover the repayment of this money. The contract entered into between plaintiff and the Kalamazoo Company and Sheets was made a part of the bond and provided for the advancement of the money and the giving of the note as stated. The condition of the bond was that the surety company would indemnify and save harmless the plaintiff from any pecuniary loss by reason of the breach of any of the terms of covenants of the contract on the part of the Kalamazoo Company. When the Kalamazoo Company failed to furnish sand and gravel called for by the contract or to repay the balance of the $6,000 remaining unpaid after plaintiff had credited it with the cost price of the sand and gravel that was delivered, this condition of the bond was breached and the surety company was liable for such breach. The defendant makes the further point that any damages suffered by reason of this $6,000 item is barred by the limitation in the bond which provides that the surety company would not be liable in any suit, action or proceeding instituted later than the 1st day of December, 1917; that while plaintiff brought this suit September 11, 1917, no damages were sought to be recovered on this item in the statement of claim then filed but that the first time plaintiff sought to recover on account of this item was when it filed its amended statement of claim March 17, 1919, which was after the limitation

"EXHIBIT 1: Jay Gould Investigation Report

Six thousand dollars [sic] is secured in this manner by promissory note to Secretary Treasury, Commonwealth Silkworks, are due July 1, 1919, interest and to apply on payment of mortgage held Jacobson Co. 2010, for sand and gravel to be delivered in Detroit, 1920."

On total the note was produced by plaintiff and not attorneys received in evidence.

Defendant testimony that plaintiff never presented any limiting on the time or advance of 60,000 for the reason that the conditions of the loan on not cover the expenses of this money. The testimony of Thomas Blackwell was that plaintiff never gave the defendant any guaranteed income, only promised to pay the expenses and grading for the enhancement of the money and the giving of the note as stated. The testimony of the bank was that the money actually went directly into their account the plaintiff from any personally free by reason of the transfer of the 60,000 to defendants of the interest of the Gilmanner Company. When the Gilmanner Company failed to furnish sand and gravel called for by the contract or to apply the interest of the 60,000 promissory notes which plaintiff had executed to the loan price of the sand and gravel, the defendants were the sole beneficiaries of the money. The defendants never the entire amount was liquidated. The defendants never the entire amount point that any damages suffered by reason of this failure was in excess by the liability to the note which provided that the entire company would be liable to the note, reduce or prevent receiving interest from the 1st day of December, 1917. That while plaintiff [illegible] Supplementary 21, 1917, he [illegible] in contracting to buy land on the vicinity of Lake Shore Drive. The first time the plaintiff sought to interfere on account of this time was when it filed its amended statement of claim during 17, 1919, which was after the liquidation

period in the bond had expired. In the original statement of claim damages were claimed by reason of the Kalamazoo Company's failure to deliver 12,000 yards of sand and gravel as provided in the contract which necessitated plaintiff's purchasing same in the open market at an excess of $15,000 over the contract price. We think while this statement was rather general in its terms and did not specifically refer to the item under consideration, yet it was sufficient to cover the item in question. But in any event there is no merit in defendant's contention for the reason that the suit was brought on September 11, 1917, before the limitation period fixed in the bond and the only condition of the bond was that such suit be instituted not later than December 1, 1917. In these circumstances the filing of the amended statement of claim, even if it be conceded that this brought the item of $6,000 into the case for the first time, might be considered as an assignment of an additional breach and it is the settled law of this State that on such a bond different breaches may be assigned at different times whether they occur before or after suit was brought. Lesher v. U. S. Fidelity & Guaranty Co., 239 Ill. 302; McDole v. McDole, 106 Ill. 452. The Lesher case was against the same surety company as in the instant case on a bond which contained the same language as the provision in the bond before us. There the bond provided that suit was to be brought not later than March 15, 1903. Suit was not brought until after that time. It was there contended that the period of limitation fixed in the bond was of no effect for the reason that under the circumstances in that case the damages were not ascertainable on March 15, 1903, since the record showed the damages accrued after that date. The Supreme Court held that the limitation was binding and that suit should have been brought not later

than the date mentioned, but if damages had accrued after that date, additional breaches might be assigned. The court there said that the bond was to be treated as a contract of insurance and strictly construed against the surety company, and that section 35 of the Practice Act authorized assignments at different times of as many breaches as plaintiff might think proper. In the Ricole case suit was brought on a bond given to insure the payment of rent. A breach of the bond was claimed for one year's rent and judgment entered accordingly and paid. Afterwards application was made to the court, on notice to the defendant, for leave to sue out a writ of inquiry to assess damages for a further breach and in this matter the damages claimed were for another year's rent which was due and owing at the time of the institution of the suit. The court there said, (460): "It is contended that under the statute the judgment for the penalty of the bond stands only for such breaches as may afterwards happen, and as the rent sought to be recovered was due before the judgment for the penalty of the bond, the writ of inquiry to assess damages will not lie. This question was settled in People v. Compher, 14 Ill. 447, where it was expressly held that any breach of the conditions of the bond for which damages have not already been assessed, forms the proper subject-matter of a new assignment and assessment."

The further contention is made that plaintiff did not loan the Kalamazoo Company the $6,000 in accordance with the contract entered into between the parties, but that it appears from the evidence this money was advanced by the Beatrice Company since it was their check for $6,000 that was given to the Kalamazoo Company. It is argued that this is such a variance from the terms of the contract as releases the surety. There is no merit in this point. The Beatrice Creamery Company gave a check for $6,000, payable to the plaintiff. The plaintiff

than the -ia considered, but if damages had lastured after that date, additional damages might be maintained. The court there said that the Jones and le Ju Crowhed ci a difficult of individual and strictly personal injuries in tort. Thus, and that machine ES of the Statutes has established management as different times of an many treatment as plaintiff might bring proper. In the Kaplan case suit was brought on a bond given to insure the payment of rent. A breach of the bond was claimed for the year's rent and judgment entered accordingly was paid. Afterwards application was made to the court, as matter of defendant, for leave to sue a suit of inquiry to assess damages for a further breach on in this matter the damages claimed were for another year's rent which was due and owing at the time of the institution of the suit. The court there said. (p.31): "It is material that we must distinguish the inquiry as to the quantity of the damages for the breach of the bond above only, or and therefore as any otherwise having, and as the court should or be entitled to the judgment the inquiry for the quantity of the damages, the suit of inquiry to assess damages will not lie. This quotation was written in Jones v. Thomas, 1 K.B. 547, where it was expressly said that by breach of the condition other than for which damages have not already been recovered, lapse the proper subject-matter of a new declaration and adventure."

The TRUCKS MANUFACTURING is given that plaintiff in the loan the Kalamazoo Company the $2,000 in guarantee with the payment related into between the parties, but that it appears for the plaintiff has not received by the Michigan Company that time it was that their which the $2,000 that was given to the Kalamazoo Company. If it appears that this is plain a material from the terms of the payment or release the matter. There is no merit in this point. The Michigan Company began a claim for $6,000, payable in the plaintiff. The plaintiff

endorsed this check and gave it to the Kalamazoo Company. It was immaterial to this defendant as to where the $6,000 came from since it was given to the Kalamazoo Company by plaintiff. But the defendant further argues that there was a departure from the terms of the contract by reason of the fact that the note given by the Kalamazoo Company for the $6,000 was not given to the plaintiff as the contract provided but was made payable to the Beatrice Creamery Company and that there was no evidence that this departure was brought to the knowledge of the surety company. On this phase of the case the defendant sought to introduce exemplified copies of court files wherein the Beatrice Company had brought suit on the note against the Kalamazoo Company in the State of Michigan. This evidence was excluded on objection of plaintiff. Since we are remanding the case for a new trial, we think we should say that we are of the opinion that the court was in error in excluding the offered evidence. We are also of the opinion that the court was in error in refusing plaintiff's offer of the letter of January 15, 1917, above quoted, and of which exclusion plaintiff complains. The evidence shows that this $6,000 was in the nature of an advance payment made by plaintiff to defendant and the contract provided that the defendant should give the note, not as payment, but as evidence of the loan or advance payment. Defendant was charged on plaintiff's books with this amount and credited for gravel and sand which it shipped in partial fulfillment of the contract. When the amount of gravel and sand shipped amounted to $6,000 then plaintiff was required to deliver up the note to the Kalamazoo Company. If the note belonged to the Beatrice Company plaintiff could not deliver it up and the Kalamazoo Company might be

endorsed this check who gave it to the Insurance Company. It was immaterial to this defendant as to whom the $4,000 came from since it was given to the Insurance Company by plaintiff. But the defendant further argues that there was a shortage from the funds of the Insurance Company at the time of the theft, that the note given by the Insurance Company for the $4,000 was not given to the plaintiff as the personal creditor but was only given to the Insurance Company, and that there was no evidence that this defendant was aware of the insolvency of the Insurance Company. On this phase of the case the defendant argues in substance (paraphrasing) that if there was any fiduciary relation between the Insurance Company and plaintiff, the defendant cannot be held liable for the theft of the money by the Insurance Company, and that the defendant was not liable in the case at bar because the plaintiff's action of trover was barred by the statute of limitations, since the theft was committed on the 2nd day of January, 1927, and the suit was filed on the 12th day of January 14, 1927, more than two years after the date of the theft. The evidence shows that the $4,000 was in the hands of an Chinese payment made by plaintiff to defendant and the contract provided that the defendant not should give the note, not as payment, but as evidence of the loan or advance payment. Defendant was charged on plaintiff's books with this amount and credited for travel and hotel expenses in carrying the affairs of the company. The amount of travel and hotel expenses amounted to $4,000. Plaintiff was required to return to the city as the Insurance Company. If the note belonged to the Insurance Company plaintiff could not return it to and the Insurance Company might

required to pay it twice. This would be such a violation of the terms of the contract, if not acquiesced in or approved by the surety company, as in our opinion would release it from liability. There is no merit in the point sought to be made that credit for the sand and gravel shipped was not given on the note since credit was given on plaintiff's books. This was sufficient provided that plaintiff was in a position to surrender the note to the Kalamazoo Company when $6,000 worth of sand and gravel had been delivered under the contract. On a re-trial of the case all the facts in reference to this item should be presented.

SECOND. As to the item of $4564 which plaintiff claims to have expended in purchasing material to be mixed with the sand and gravel so as to make it usable. Plaintiff's position is that the sand and gravel delivered was not of the kind and quality provided by the contract between it and the Kalamazoo Company and that to render it in accordance with the contract plaintiff was required to purchase other material to mix with the sand and gravel, and in so doing it incurred the item of expense complained of. The evidence shows that plaintiff complained of the quality of the material furnished and offered evidence tending to show that the expenditure made was necessary to bring the sand and gravel up to the requirements of the contract. We think this evidence was entirely proper. But the defendant contends that even if it had breached the contract, plaintiff was also guilty of a breach because it failed to pay for the sand and gravel delivered and in these circumstances no recovery could be had on the contract. Since we have already held that the $6,000 was an advance payment and since no claim was made by defendant that they had shipped this amount of sand and gravel, it follows that the sand and

gravel delivered was paid for before delivery.

THIRD. As to the other item of $3183 claimed by plaintiff as damages by reason of it being compelled to go into the open market to purchase additional sand and gravel. The defense interposed to this was that the failure to ship all the sand and gravel required by the contract was due to a shortage of cars and that under the bond and the contract there was no liability where the failure to ship resulted from any default of the railroads. Evidence was introduced by plaintiff tending to show that more cars were furnished the Kalamazoo Company than were used by it, and that often empty cars were pulled out of the gravel pit where sand and gravel was being loaded. It is, therefore, argued that the failure to ship did not result from a shortage of cars but through the negligence or inattention of the Kalamazoo Company. On the other hand, the defendant offered a great deal of evidence tending to show that it had endeavored to obtain cars from the railroads but that on account of the war conditions the Kalamazoo Company was unable to do so and that this was the sole cause of the failure to ship the required amount. We think this was a question for the jury. Complaint is made by both sides as to the rulings of the court on exclusion and admission of evidence tending to present this issue. Plaintiff contends that sand and gravel was shipped by the Kalamazoo Company to other parties at higher prices than the price here contracted for and that this was the reason why its contract was not fulfilled. And it is argued that the court erred in refusing to permit the witness Preston to testify as to what the Kalamazoo Company received for sand and gravel furnished to Byers Brothers, and that the court also erred in permitting

[illegible] defendant was held not liable in this action.

[illegible] As to the other item of which plaintiff complains, namely, the damage by reason of it being compelled to a lower the open market to procure additional cars and power. The defense testimony is that they did not attempt to buy all the load and power required by the contract but only a sufficient amount to make up the deficiency or more than what under the load and conditions the defendants were not liable. Evidence was introduced to show that some cars were unavailable and that these cars were used or the power had to be, and that other cars were rented and the power purchased at the power and paid for power and paid for being loaded. It is, therefore, argued that the failure to ship all cars resulted from a shortage of cars and through the negligence or incompetence of the defendant company. On the other hand, the defendant claims and that it evidence tending to show that it had endeavored to obtain cars from the railroad but that on account of the war conditions the defendants therefore was unable to do so to the full and the only cause of the failure to ship the required amount. The court gave a question for the jury. Complaint is made by both sides as to the rulings of the court on admission and exclusion of evidence tending to prove the issue. Liability results that each and every was brought by the defendant company on other grounds of which plaintiff claims that the price and conditions the defendants are liable for the amount of the contract and not FULFILLED. The is to argue that the only cause of the failure to secure the cars because the actually is to the case the Delaware Company Company, the and the general contract to Great Northern, and that the transportation arose in [illegible]

the same witness to testify that Byers Brothers' order was smaller than that of plaintiff. We think the court should have permitted the witness to testify on both of these propositions as it might assist the jury in determining whether shipments made to other customers at a higher price was the reason for the failure of the Kalamazoo Company's failure to perform its contract with plaintiff. Of course, the Kalamazoo Company was not under the law required to perform plaintiff's contract to the exclusion of all its other contracts but it might prorate its output if there was a shortage of cars. Krug Coal Co. v. C.G.Blake Co., 218 Ill. App. 85. Further complaint is made that the court permitted this witness to testify that the Kalamazoo Company discontinued business and that its finances were affected adversely by the contract with plaintiff. This point is well taken. The evidence should not have been admitted. Plaintiff also complains that it was error to permit this witness to testify to the kind of cars used in Michigan for the transportation of sand and gravel and to the efforts made by the Kalamazoo Company to get cars, and to conversations of officers of the latter company with the railroad officials in this regard. We think all of this evidence was properly admitted as tending to sustain defendant's contention that the reason all of the sand and gravel was not shipped was that the Kalamazoo Company was unable to get cars and, of course, it had the right to show what was said and done between it and the railroad in this respect, whether that included letters between the railroad and the Kalamazoo Company or conversations between their representatives.

Complaint is also made by plaintiff to the ruling of the court in not permitting the witness Witbank to give the

summaries of invoices (some 250 in number) which were received in evidence. We think this was error. People v. Gerold, 265 Ill. 448. It is also contended that the court erred in excluding what was known as the Barth letters, being letters written by Barth, a representative of plaintiff who was sent to the gravel pit, tending to show that there was an ample supply of cars at the disposal of the Kalamazoo Company but that they were not used. The evidence shows that Barth, as a representative of the plaintiff, went to the gravel pit and checked from day to day, covering about a month's time, the cars that were switched into the pit and afterwards hauled out, some loaded and some empty. He made a written report nearly every day to plaintiff. The memoranda which he made were lost or destroyed, and the letters which he wrote plaintiff were offered in evidence. These letters so far as they tended to show that the failure to ship the quantity of sand or gravel contracted for was due to the fault of the Kalamazoo Company and not to any shortage of cars, if sworn to be correct, and that they were written at the time they purported to be and the witness had no present recollection of the matters therein stated, would be admissible. Koch v. Pearson, 219 Ill. App. 468. But the letters were offered in their entirety and there were some matters contained in some of them that was improper as such matters did not go to the point under consideration. In these circumstances, of course, the court was right in excluding them. On a retrial, if the evidence brings parts of them within the rule enunciated in the Koch case, such parts should be admitted. Over the objection of plaintiff the court admitted letters written by the architect of the building being constructed in Detroit to the Kalamazoo Company. These letters should have been excluded as there is nothing in the evidence

before us to indicate that anything the architect might do or say could affect plaintiff's rights. We think there was no error in admitting defendant's exhibit 12 which was a statement of the account it claimed was due and owing from the plaintiff to the Kalamazoo Company since there was evidence tending to show that this was delivered to that company by the plaintiff and payment demanded. Defendant's exhibit 9 purporting to be photographic copies were not admissible unless they were within the rule announced in the Koch case.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON AND TAYLOR, JJ. CONCUR.

206 - 25978

C. E. HULTQUIST,

Appellant,

v.

LENA HUMPHREYS,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

222 I.A. 655

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant claiming a balance of $3,000 due him for commissions as a real estate broker. At the close of plaintiff's case on motion of the defendant, there was a directed verdict in her favor to reverse which defendant prosecutes this appeal.

The second amended statement of claim, on which the case went to trial, in substance averred that plaintiff, a real estate broker, consummated the exchange of all of the capital stock of the Western Furniture Exposition Company, a corporation, the stock being owned by the defendant, for certain real estate located at the corner of Armitage avenue and 45th Place, Chicago, owned by one James W. Hedenburg. That the Exposition Company owned a certain leasehold interest under a lease expiring July 1, 1997, demising premises known as 1433-1437 Wabash avenue, Chicago; that in consideration of plaintiff procuring the exchange of the properties the defendant would pay plaintiff "a fee or commission for his services, the amount not being stated but that items implied the usual, reasonable, customary and ordinary brokerage or commission paid in similar transactions;" that upon the exchange of the

properties the defendant owed the plaintiff as the reasonable, usual and customary fee, $5,000; that through plaintiff's efforts the defendant received in exchange for her stock in the Exposition Company property of the value of $200,000; that plaintiff had received on account of his commission the sum of $2,000 leaving a balance due him of $3,000.

The defendant filed her affidavit of merits setting up numerous defenses, not here necessary to be noted, and after denying that there was an agreement on her part to pay plaintiff any commission or that he rendered her any service, set up that the property which plaintiff claimed to have procured Hedenberg to convey to her, was worth only about $80,000, and further averres that the $2,000 which plaintiff had already received was more than the reasonable, usual and customary fees for the services he claimed to have rendered.

It appears from the evidence that a written contract was entered into between the defendant and Hedenburg for the exchange of the properties. This contract states that the Exposition Company was the owner of a 99 year lease on the Wabash avenue property and that there was an indebtedness of $147,000 due on that property. The contract contained the following provision: "It is further mutually agreed that brokerage fee or commission shall be paid to A. J. Blakely and C. S. Hultquist as agreed by the respective parties hereto as heretofore agreed by them." The evidence further shows that the exchange was made as provided in the contract, the shares of stock in the Exposition Company being turned over to Hedenburg and a deed for the real estate which he owned was made and delivered by agreement to one Erickson to whom defendant was indebted, so that in substance defendant received for her interest in the Wabash avenue property Hedenburg's

real estate and in consideration therefor transferred to him the shares of the entire capital stock of the Exposition Company. The evidence further shows that the Hedenburg property was worth about $80,000. It further appears that all the negotiations prior to and leading up to the consummation of the exchange were conducted by plaintiff with defendant's husband, William R. Humphreys, since deceased. The evidence also tends to show that the usual and customary commission charged by real estate brokers in Chicago for procuring the exchange of properties was 2½%, but whether this is to be computed on the sale price of the Wabash avenue property or only on defendant's equity is a controverted question. Plaintiff takes the position that he was entitled to 2½ per cent of the value of Hedenburg's property, viz: $80,000, plus the incumbrance of $147,000 on the Wabash avenue property. Defendant contends that in no event was plaintiff entitled to a commission on more than what she got for her property, viz: $80,000.

The defendant first argues that the plaintiff is not entitled to recover for the reason that the evidence shows he carried on all his negotiations with William R. Humphreys, defendant's husband and that the latter paid plaintiff $2,000 as commission; that William R. Humphreys promised to pay the commission within 60 days after the deal was closed, and in these circumstances it appears that there was an express agreement between plaintiff and William R. Humphreys to pay plaintiff commission; that, therefore, the instant case cannot be maintained by relying on an implied promise of the defendant because under an elementary rule of law there can be no implied contract where there is an express contract. We think this argument is beside the point. The evidence does show that plaintiff had all of his dealings with William R.

Humphreys but that the Wabash avenue property was owned by Mrs. Humphreys, the defendant, and that she executed the agreement for the exchange of the properties. In these circumstances it is elementary that she cannot be heard to say that the dealings of her husband are not binding on her.

The evidence discloses that William R. Humphreys died after the consummation of the contract and prior to the trial and under the statute plaintiff was prevented from testifying to conversations and dealings he had with him such conversations and dealings being had out of the presence of the defendant. The contract offered in evidence by the plaintiff and the plaintiff's own testimony all tend to show that plaintiff had an express agreement with William R. Humphreys for the amount of commission plaintiff was to receive. This agreement plaintiff could not prove on account of the death of William R. Humphreys, and he then sought to obviate this difficulty by proving the usual, reasonable and customary fees paid in such cases to brokers in Chicago - seeking to recover on an implied agreement . Since there was an express agreement no agreement could be implied and any evidence of a custom was inadmissible. Counsel for plaintiff, in his brief, states: "The only question is as to the amount of the commission. The contract says the commission shall be paid as agreed. Rultquist had no agreement either verbal or written with Mrs. Humphreys. If he had a verbal agreement with Mr. Humphreys as to the amount of the commission he could not testify to it now that Mr. Humphreys is dead. There being in fact no agreement with Mrs. Humphreys, the only question is what would be the usual, reasonable and customary compensation." The evidence clearly shows that there was an

express agreement between plaintiff and William R. Humphreys and we have held that this was binding on defendant because she took advantage of this agreement and exchanged her property. The agreement as to commission would, therefore, be binding on her, but there being no evidence as to what this agreement was the court could do nothing but direct a verdict for the defendant. We think this is unfortunate for the evidence shows that after plaintiff received the $2,000 from William R. Humphreys he received another check for $500 which was not paid, there being insufficient funds in the bank, clearly indicating that more commissions were due plaintiff for his services. But the wisdom or unwisdom of the statute which prevents plaintiff from testifying to the circumstances of the transaction is a question for the legislature and not for the courts.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, J. CONCURS,
TAYLOR, J. DISSENTS.

34r - 4015

IN RE ESTATE OF ROBERT R. STREET, deceased, [illegible] F. BLOOM, administrator de bonis non.

Appellee,

v.

GEORGE H. BARNARD,

Appellant.

222 I.A. 655

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

George H. Barnard filed a claim in the Probate Court of Cook County against the estate of Robert R. Street, deceased. After a hearing the claim was disallowed and an appeal taken to the Circuit Court where the case was heard by the court with a jury and a judgment entered in that court disallowing the claim, to reverse which the claimant has prosecuted this appeal.

The claim is for damages said to have been sustained by reason of the removal of some soil from two lots for the purchase of which claimant had entered into a contract with Robert R. Street in his lifetime.

The record discloses that on September 1, 1909, Robert R. Street and claimant entered into a written contract whereby in consideration of $50.00 in cash paid and a further agreement to pay $1773.18 in monthly installments Street was to convey the lots in question to claimant. By the terms of the contract claimant agreed to pay "all taxes and assessments levied after the year 1908, all assessments levied for improvements not yet made" and a certain other

special assessment, which taxes and assessments the purchaser assumes and agrees to pay as part of the purchase price. The contract further provided that the claimant was "to keep said premises clear of and save said first party (Street) harmless from all claims, liens or liabilities, on account of any work or labor done, or material furnished on account of any improvements or buildings erected on said premises." It further provided that if the claimant failed to pay the taxes or assessments or made any default in the monthly payments, or failed to perform any of the covenants of the contract to be performed by him, then Street might, at his option, declare the entire amount of deferred payments due and payable and the contract forfeited, and that Street should "have the right to enter and take possession of said premises, and shall be entitled to dispossess said second party, or any person or persons in possession of the same or any part thereof." It further provided that the contract was not to be recorded by the claimant and that it was to be binding upon the heirs, executors, administrators and assigns of the respective parties

The evidence tends to show that the claimant made payments on account of the purchase price of the lots to F. G. Wood & Co., real estate agents, and afterwards made other payments to heirs of the deceased. After the payments were all made the administrator de bonis non executed and delivered to the claimant a warranty deed as provided in the contract, and sometime thereafter this claim was filed in the Probate Court. The evidence further tends to show that the soil was removed from the lots after Street died and before the warranty deed was issued, by some third party without any authority from either of the parties to the contract.

A number of questions are discussed in the briefs, but in the view we take of the case only one will be necessary for us to consider. Claimant's contention is that since the evidence shows he was not in the actual physical possession of the lots and since the contract did not authorize him to take possession, (the legal title and right of possession remaining in Robert H. Street until the execution and delivery of the warranty deed,) the estate should be held liable for damages occasioned by the removal of the soil from the lots. If we assume that claimant would be entitled, under his theory of the case, to damages for such removal, we cannot agree with his construction of the contract. We think the contract clearly implies that the claimant was to have possession of the lots after the date the contract was entered into, for it expressly provides that claimant shall pay all taxes and assessments on the property and keep it free from liens on account of any work done or materials furnished for any buildings or improvements erected on the lots. And further, if the claimant defaults in any of the payments or other covenants of the contract, there is an express provision that Street had the right to take possession of the premises and dispossess the claimant. From this we think it clear that claimant was entitled to possession of the lots and, therefore, under his own theory of the case no recovery could be had for the damages claimed. And the terms of the contract could in no way be changed or modified by the testimony of claimant to the effect that before all the payments were made he conferred with the real estate agent and requested that he be allowed to remove some of the soil, which request the real estate agent refused stating that claimant was not entitled

to the possession of the lots. There is no evidence that the real estate agents had authority to do anything but receive some of the payments. The court correctly dismissed the claim.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMPSON AND TAYLOR JJ. CONCUR.

316 - 25574

EXCELSIOR MOTOR MFG. AND SUPPLY CO., et al, Appellees,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
CALEB HARRISON, et al, Appellants.	

222 I.A. 655

MR. JUSTICE TAYLOR delivered the opinion of the court.

On February 10, 1919, the Excelsior Motor Mfg.&Supply Co. and Arnold Schwinn, complainants, filed a bill of complaint in the Superior Court of Cook County, and on February 11, 1919, a temporary injunction was issued enjoining the defendants, among other things:

> From in any manner interfering with, hindering, obstructing or stopping the business of the complainants.
>
> From picketing or maintaining any picket or pickets, at or near the premises of the complainants, or along the routes followed by employees of complainants in going to and from the places of business of the complainants.
>
> From standing, patrolling or congregating in front of or in the vicinity of the places of business of the complainants.
>
> From standing, patrolling or congregating along the routes taken by those going to and from the places of business of the complainants for the purpose of observing, watching, intercepting or stopping those going to and from the places of business of the complainants.
>
> From congregating about or near the places of business of the complainants or in the places where the employees of the complainants are lodged or boarded, for the purpose of compelling, inducing or soliciting such employees to leave their employment, or to refuse to work for the complainants, or for the purpose or with the effect of preventing or attempting to prevent any person from freely entering into the employment of the complainants.
>
> From watching or spying upon the places of business of the complainants, and those who go to and from the places of business of complainants.

From following the employes of complainants, to and from their places of employment, or homes, or from calling upon such employes or their families for the purpose or with the effect of molesting or intimidating such employes or their families or for the purpose of inducing such employes to leave their employment.

From assaulting, menacing, threatening or intimidating the employes of the complainants, or persons seeking to become employes of the complainants or persons seeking to inquire about employment from the complainants.

From attempting by payment or promise of money, employment or other rewards to induce the employes of the complainants, to leave their employment or other persons to abstain from applying for employment or from entering into the employment of the complainants.

From organizing or maintaining any boycott against complainants or its employees, from attempting to prevent by strikes, or threats of calling strikes or boycotts, any person or firm from dealing with complainants.

From doing anything which subjects the employes of the complainants or any of them to hatred, criticism, censure, scorn, disgrace or annoyance, because of their employment by the complainants.

From interfering with or attempting to hinder complainants from carrying on their business in the usual and ordinary way.

The defendants to the bill were Caleb Harrison, A. L. Kern, Thomas Abrahamson, Emil Peterson, Charles Hertke, Hulda Struble, Fred J. Schell, Otto Surda, William Nittman, Joe Blanco, Walter Reverasky, V. Lewinske, S. Forberg and Henry Ulrich. A large volume of affidavits in support of the bill were filed with it. The defendants were all served with the writ and had all had notice of the injunction not later than February 12, 1919.

Despite the injunction and knowledge thereof the respondents persisted in maintaining a system of picketing and patrolling about, and in the immediate vicinity of the plant of the Excelsior Motor Mfg. and Supply Co. from February 12, 1919, up to the time of the hearing of the contempt proceedings which began May 1, 1919. Those who picketed and patrolled carried or bore placards, 6 by 8 inches, exhibiting the words; "Strike, Excelsior Motor Mfg. & Supply Co."

At first there were 50 to 70 pickets, later shifts of 16 pickets. The plant was picketed 10 hours each working day. Workmen, who desired to return to work for the company feared the pickets and were so deterred from returning, and persons who desired to enter the factory to apply for work seeing the pickets and the signs they bore, were made afraid, and went away without applying for employment. The business of the company was thus interfered with up to the time of the hearing in the contempt proceedings.

On February 18, 1919, the company filed its first petition for a rule to show cause, and on April 8, 1919, a supplemental petition against the respondents. Many affidavits were attached to both petitions.

On February 20, 1919, the respondents Harrison, Abrahamson, Peterson, Schack, Anderson, Stein, Scheremer and Redmond, answered the petition. They denied any willful or deliberate violation of the injunction but alleged that they and others associated with them in the strike have no certain means of spreading information that there was a strike except by word of mouth and that for the purpose of notifying prospective employees that a strike was in progress they informed the persons approaching the plant of that fact; that the sole purpose of their being in the neighborhood of the plant was merely to inform the public in general that the strike was in progress and "to make known their demands to people who might be seeking employment and be in sympathy with the causes for which" they and others were striking; that on a number of occasions they walked past the place of business of the complainant, and on February 17, a parade took place in which a number of strikers participated; that

in said parade they were cards and placards setting forth that a strike was in progress; that they marched past the place of business of the complainant and sang songs while doing so.

Six respondents, Harrison, Peterson, Schreemer, Stein, Lahock and Redmond, filed an affidavit in support of the answer to the petition and therein each admitted that he had been in the vicinity of the plant and on various occasions were placards containing words announcing that a strike was in progress; that each has regularly attended meetings of striking employees in the hall at Moolin and Armitage avenue; that that is two blocks from the plant. They all deny, however, that they have picketed or patrolled for the purpose of intimidating; that they have been present merely to notify by word of mouth prospective employees that a strike was in progress; that as the petitioner had advertised for employees to fill the vacancies made by the strikers it became necessary for them to inform applicants for employment that there was a strike in progress on the ground that if they were so informed they would not desire to compete with organized labor and would not desire to take positions left open by the respondents and other strikers; that if it is unlawful to enjoin the striking employees, thereby prohibiting them from speaking to the employees of the petitioner for the purpose of informing those seeking employment at the plant of the petitioner that a strike was in progress. Each of the respondents admitted that he had stated to persons other than employees that a strike was in progress; and that he has walked past the petitioner's factory a number of times, almost daily, and displayed placards bearing words which

in substance announced that a strike was in progress.

On April 8, 1919, on motion of the solicitor for the petitioners the respondents were ordered to appear on April 17, 1919, and show cause why they should not be attached and punished for contempt of court for violating the injunction. On the same day a supplemental petition was filed praying for a rule to show cause. That petition alleged picketing and patrolling and wearing of signs; that many of the employees desired to return to work but were frightened away by the picketing and patrolling. On April 15, 1919, the respondents answered the supplemental petition. They therein denied picketing since the first petition was filed, but admitted that a number of persons since February 18, 1919, have walked either in pairs or singly near the plant, and have worn conspicuously displayed signs stating that a strike was in progress; that on February 18, 1919, about 700 of the employees of said petitioner quit their employment and went on strike and struck because their hours of work per day were increased from 8 to 9 hours. They further admitted picketing and patrolling, as far as walking about the plant was concerned, bearing signs announcing that a strike was in progress, but alleged that such was necessary, in order that prospective employees might be informed of the truth; that the signs were carried and prospective employees spoken to merely to give them information that there was a strike. On April 21, 1919, certain respondents were ordered to file not later than April 28, 1919, their answer to the first supplemental petition for a rule to show cause. On April 28, 1919, they filed an answer denying picketing but admitting that a large number of persons since February 18, 1919, have walked near and about

the plant wearing conspicuously displayed signs announcing that a strike was on.

On May 1, 1919, there was a hearing of the contempt matter before the chancellor; affidavits, testimony of witnesses and other evidence was introduced, and on May 26, 1919, an order was entered finding that the respondents had failed to show cause why they should not be punished for contempt. Their punishment was then fixed as follows: Harrison and Peterson were fined $300.00 each; Freiss and Hammond $150.00 each; Abrahamson, Anderson, Schreiner, Schock, Anglund, Jajicek, Fred Schultz, Adolph Schultz, Pellegrini, Dulin, Doth and Lynge, $100.00 each; and Abrahamson and Schock were sentenced, in addition to being fined, to fifteen days each in the county jail. This appeal is therefrom.

It is contended by counsel for the respondents, (1) that the chancellor did not have jurisdiction to issue the original injunction, (2) that the injunction violates Sec. 4, Art. II, of the Constitution of Illinois, and the Fourth Amendment of the Constitution of the United States, (3) that the violation of the injunction unless willful is not punishable, (4) that the extent of punishment for contempt is discretionary and must not be excessive.

(1) Did the court have jurisdiction to enter the order? The bill of complaint set forth the appropriate allegations of a case coming normally within the equitable jurisdiction of the Superior Court. It set forth the name, business and location of the complainants; that there arose a claim among the B&I employees that a certain number of hours constitute a week's work and that there should be 1½ hours pay

for overtime; that the company refused to grant certain demands which were made; that certain employees who refused to work more than a certain number of hours a day were discharged; that one Korn was discharged; that his reinstatement was demanded by certain leaders of the workingmen but was refused; that a meeting was held at which it was arranged to institute a strike; that a strike was called and when certain employees appeared at the works on Monday morning, February 3, to go to work certain agitators or leaders among the striking workmen intimidated them in such a way, by threats, that the greater part of them by reason thereof did not enter the plant and go to work, being fearful of injury at the hands of the striking workmen. The bill also described certain picketing, assaults, threats, and the calling of vile and insulting names and other wrongful interferences with the employees; and charged that such conduct if continued would prevent the complainants from continuing their business and complying with the terms and obligations of certain contracts and orders they had outstanding, and would cause them great loss and damage. It also set up that there was no adequate remedy at law, and prayed for a temporary injunction restraining the defendants from picketing, etc. From the foregoing it will be seen that the court had jurisdiction of the parties and subject-matter and the power to decide whether an injunction ought to issue and also what the character of that injunction should be. The injunction that was actually ordered by the court prohibited, among other things, picketing and patrolling the premises of the complainants. That order of the court we are of the opinion was entirely within the jurisdiction of the chancellor. As the court said in Lyon & Healy v. Piano Workers Union, 289 Ill. 176; "There can be no doubt

that the Circuit Court of Cook County had jurisdiction over the subject-matter and the parties. It had jurisdiction to determine whether the bill was sufficient to justify the issue of an injunction and the character of the injunction which should issue." Franklin Union v. The People, 220 Ill. 355; O'Brien v. People, 216 Ill. 354; Court Rose Foresters of America v. Corns, 279 Ill. 605.

We are of the opinion that the chancellor did not err in taking cognizance of the bill of complaint and that the issuance of the injunction was a judicial act of the court legally within its jurisdiction and rightful power. It follows, therefore, that, as the temporary injunction was issued by the chancellor in the exercise of the jurisdiction which he had at the time, it must be obeyed even though in itself erroneously made. As the court said in Court Rose Foresters case (supra), "The power of the courts to enforce their orders and judgments is a necessary incident to the administration of justice, and if they were without power to compel obedience or to prevent unwarranted interference with the administration of justice they could not perform their functions or secure the rights of litigants, however, important."

(2) Does the injunction violate any Federal or State Constitutional provision? Counsel for the respondents contend that the injunction violates certain constitutional provisions. That contention, however, is, quite obviously untenable. In Flannery v. People, 225 Ill. 73, the court said:

> "The constitutional questions attempted to be raised are purely imaginary, unless they are based upon the presumption that the whole proceeding was void for want of jurisdiction in the superior court. Having seen that the court had jurisdiction of the

subject-matter of the suit and of the parties, to hear and determine the matters urged in the bill for an injunction, and to issue the writ, it is difficult to see upon what theory it can be urged that there was not due process of law. The trial was under the ordinary and usual forms of law. The contempt proceeding was instituted in conformity with the practice in such cases, and was in the only court which had the power to hear and punish appellants for the violation of its judgment and decree. Every element of due process of law is here shown."

Gompers v. Buck Stove & Range Co., 31 S.C. 492. The picketing and patrolling, and the wearing of placards, constituted conduct that was illegal. Nor did an injunction which prohibited it, violate in any way any constitutional right of the striking workmen. The dictum quoted from Malleable Iron Co. v. Michalek, 279 Ill. 221, is not in point. The truth is that it is now the law that mere picketing, even without carrying placards announcing that a strike is in progress, may be properly enjoined. American Cigar Co. v. Berger, et al, Gen. No.25718; Berger[illegible] v. Alexander, 198 Ill. App. 568; also the Franklin Union case (supra.

In Barnes v. Typographical Union, 232 Ill. 436, Mr. Justice Cartwright used the following language:-

"The very fact of establishing a picket line is evidence of an intention to annoy, embarrass and intimidate, whether physical violence is resorted to or not. There have been a few cases where it was held that picketing, by labor union, of a place of business is not necessarily unlawful if the pickets are peaceful and well behaved, but if the watching and besetting of the workmen is carried to such a length as to constitute an annoyance to them or their employer it becomes unlawful. But manifestly that is not a safe rule and furnishes no fixed or certain standard of what is lawful or unlawful. Any picket line must result in annoyance both to the employer and the workmen, no matter what is said or done, and to say that the court is to determine by the degree of annoyance whether it shall be stopped or not would furnish no guide, but leave the question to the individual notions or bias of the particular judge. To picket the complainants' premises was in itself an act of intimidation and

> an unwarrantable inference with thier rights. Pickets were, in fact, guilty of actual intimidation and threats, but if they had not been, the complainants were entitled to be protected from the annoyance."

Further, the contention that the injunction order violates certain constitutional provisions cannot be urged in this court. As we said in American Cigar Co. v. Berger, Gen. No. 25712, "When matters involving a construction of the constitution are relied upon by an appellant the appeal should be direct to the Supreme Court and when an appeal is perfected to this court such questions are waived." Lester v. The People, 150 Ill. 403; Bratsch v. The People, 198 Ill.168; The Denison Cotton Co. v. Schermerhorn, 257 Ill.128; McDonald v. City of Spring Valley, 285 Ill. 52.

(3) It is contended by counsel for the respondents that the violation of the injunction unless willful is not punishable, and (4) that the extent of punishment for contempt is discretionary and must not be excessive. In Hake v. The People, 230 Ill. 194, the court said:

> "The law is well settled that a court of chancery may impose a fine alone for the violation of an injunction and commit the party until the fine and costs are paid, or, in its discretion, may fix a definite period of imprisonment, either with or without a fine. The court granting the injunction is necessarily invested with a large discretion in enforcing obedience to its mandate, and upon proceedings for attachment for its violation the extent of the fine and imprisonment to be inflicted as a punishment for the contempt rests in the sound legal discretion of the court itself. Courts of appellate jurisdiction are exceedingly averse to interfering with the exercise of such discretion, and will not ordinarily reverse the action of the inferior courts in such matters. High on Injunctions, Sec.1458, and cases there cited."

The chancellor in fixing the punishment of the respondents stated that it ought to be such as would "at least justify the authority of the court" and impress upon the respondents that the court's integrity should not be assailed and that if they thought the injunction burdensome and wrongfully issued they should have asked the court to have modified it; that they were not entitled after the injunction was issued to say that they would disregard it. The evidence shows that the conduct of the respondents, which was considered by the chancellor to be contemptuous, was willful.

The chancellor fined James Abrahamson $100.00, and

> an unwarrantable intrusion with a home obtain. [illegible] were, in fact, guilty of actual substantial injury or damage, but if they did not have, the complainants were entitled to be protected from the annoyance."

Further, the realization that the injunctive relief [illegible] constitutional protection cannot be urged in this court. In an [illegible] Mich. v. Impact, Inc., 8[illegible], "When matters involving a construction of the constitution are raised upon by an appellant the appeal should be dismissed in the lower court and when an appeal is perfected to this court such questions are waived." Lerner v. [illegible], [illegible] Dunham v. [illegible], [illegible] [illegible] v. [illegible], [illegible] v. [illegible], [illegible].

(3) It is contended by counsel for the [illegible] that the violation of the injunction order will be not punishable, and (4) that the extent of punishment for contempt is discretionary and must not be excessive. In [illegible] v. [illegible], [illegible], [illegible] court said:

> "The law is well settled that a court of chancery may issue a fine order for the violation of an injunction and remedy the party until the fine was paid or paid, or, in lieu otherwise, may fix a definite period of imprisonment, either with or without a fine. The court punishing the [illegible] is responsibly answered with a large discretion in [illegible] conditions in its mandate, and upon [illegible] for [illegible] of the fine and imprisonment to be imposed on a punishment for the contempt [illegible] the usual legal discretion of the court itself. [illegible] of [illegible] are [illegible] to [illegible], and will [illegible] [illegible] of the defendant [illegible] such matters. [illegible], [illegible], and [illegible]

The discussion in Fleming the punishment of the [illegible] stated that it ought to be such as would not [illegible] the authority of the court" and [illegible] the [illegible] that the court's [illegible] should not be [illegible] and that if they thought the injunction burdensome and wrongfully issued they should have asked the court to have modified it; that they were not entitled after the injunction was issued to say that they would disregard it. The [illegible] that the measure of the [illegible], which was [illegible] in the order to be contemplated, was willful.

The [illegible] Fond [illegible] Abrahamson [illegible], and

sentenced him to 15 days in the County Jail "because of his actual contempt by physical manifestation, and his scorn as to the process of this court." An examination of the evidence shows that he knowingly and willfully violated the order of the court and that he was guilty of overt acts of disrespect and contempt. George Schock was fined $100.00 and sentenced to 15 days in the County Jail, "because of his activities in aiding Peterson in fixing and directing the pickets." The evidence shows that he was served on February 12, 1919; that he persisted in picketing and when a copy of the writ was served on one Brebis, he said to him, "Throw the piece of toilet paper away". Schock did not testify. His conduct was flagrantly contemptuous.

We are of the opinion that the violation of the injunction by the respondents was willful and acknowledged and that the punishment inflicted by the chancellor was not excessive.

In conclusion, as this is not an appeal from the decretal order restraining the respondents from interfering or attempting to hinder the complainants from carrying on their business in the usual and ordinary way, but is an appeal from the order of the chancellor finding the respondents guilty of a contempt of court, it follows, that the sufficiency of the bill of complaint as to whether it warranted on its face the issuance of the temporary injunction, is not before us for determination, nor is the question, whether the scope of the injunction is broader than is legally justified by the allegations of the bill. If the allegations of the bill were not true, a motion should have been made by counsel for the respondents to dissolve the injunction; not having made that motion, the respondents were bound to obey it, and now,

it having been shown that they violated the injunction and were properly adjudged guilty of contempt, the judgment against them must be affirmed.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'BRIEN, P.J. and [illegible], J. concur.

257 - 20049

ANNA PARROTT,

Appellant,

v.

CHICAGO RAILWAYS CO.,

Appellee.

APPEAL FROM

[illegible]

[illegible]

222 I.A. 656

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Anna Parrott, brought suit against the defendant, Chicago Railways Company, for injuries sustained as the result of a collision between a street car belonging to the defendant and an automobile in which she, the plaintiff, was riding. At the trial, before the defendant introduced any evidence, the court instructed the jury to find the defendant not guilty. In accordance therewith, a verdict was rendered, and judgment entered thereon. This appeal is from that judgment.

The declaration, consisting of two counts, was filed October 11, 1918. It recites, substantially, that on October 13, 1917, the defendant so negligently, carelessly and improperly drove, ran and operated an electric car, by and through which negligence the electric car ran and struck with great force and violence the automobile in which the plaintiff was riding and injured her; and that at the time the plaintiff was in the exercise of ordinary care and caution for her own safety. The defendant on November 6, 1918, filed a plea of not guilty.

The abstract of record shows that the trial of the cause began on December 17, 1919, before the trial judge and a jury.

During the opening statement of counsel for the plaintiff, the following colloquy occurred between the court and counsel:

> "Mr. Nicholson: * * * The plaintiff was sitting as I said in the rear seat. She was seated in it next to the outside, on the left hand.
>
> "The Court: Did I understand you to say that the car - the automobile in question - was running on the tracks?
>
> Mr. Nicholson: No, it was running near the tracks, just east of the track, but near to the track, so that the overhang of the car caught the rear end of the automobile; that is, they were running, I suppose, within a foot or so of the track, the northbound track. That is as I understand it.
>
> The Court: Well, what is it that you are claiming that they did?
>
> Mr. Nicholson: They came up behind this automobile and ran into the rear end of it, and tipped it over, and threw the plaintiff out and injured her.
>
> The Court: Well, were they on the tracks?
>
> Mr. Nicholson: They were near enough so that the car caught them. They were just off the tracks.
>
> The Court: What is it that you are claiming that the street car did that was wrong?
>
> Mr. Nicholson: Ran into this automobile that was in front of them.
>
> The Court: Well, were they on the tracks?
>
> Mr. Nicholson: No, not on the tracks, but very close to it, so close that they could not pass without striking them. That is my claim.
>
> The Court: Well, I don't get you.
>
> Mr. Nicholson: Well, it is like this-
>
> The Court: I don't get you. They were running where they had a right to run,- wasn't it? The street car company was running where they had a right to run.
>
> Mr. Nicholson: Yes, but they haven't any right - Well, say there is the automobile (illustrating). You know the overhang of the car is some fourteen or eighteen inches.
>
> The Court: Well, what of it?
>
> Mr. Nicholson: Well, now when an automobile is running close to the track, so that the car would not pass without striking it, then they haven't any right to wantonly, or if they knew it, to run into them.
>
> The Court: Well, the automobile can step, can't it?
>
> Mr. Nicholson: Well, they were both going in the same direction.

The Court: You will have to show me some authority on that kind of a lawsuit, Mr. Nicholson, when you introduce your evidence. I don't understand on what theory a street car, running on their rail, because somebody is running an automobile up near the track,- that because they happen to hit them, I don't understand on what theory you claim that the street car company has done anything.

Mr. Nicholson:- Why, your Honor, all claims - on the claim of humanity alone, even that. If I am running a street car on a track, and I can see that an automobile is so close that I cannot run that car along without knocking that automobile, I, as running the car or operating the car, have no right to run into them. If a man is standing so close to the track that you can see that he will be hit if he stands there, and know that he is going to be hit -

The Court: Thats a different proposition.

Mr. Nicholson: That's the same thing.

The Court: But this automobile is moving, isn't it?

Mr. Nicholson: Yes, moving north, and the car is moving north.

The Court: All right, go on.

Mr. Nicholson: (continuing opening statement): And the car overtook the automobile, running so fast that it overtook it, ran into the rear end of it.

The Court: You haven't any allegation,- you claim that they were running at an improper rate of speed.

Mr. Nicholson: Yes, your honor.

The Court: There is no charge here in your declaration.

Mr. Nicholson: Well, perhaps not that they were running at a high speed, but they ran it carelessly and negligently, and high speed is carelessness and negligence.

The Court: How wide is this street, I mean how wide was the place where the automobile was running.

Mr. Nicholson: I will state the distance between the east rail of the northbound tracks and the curb was thirteen (13) feet and six (6) inches as I have been told.

The Court: How wide is the automobile?

Mr. Nicholson: The automobile I suppose is the average width, four feet eight inches.

The Court: All right, go ahead.

Mr. Nicholson (continuing opening statement): When the car overtook the automobile -

The Court: You understand, gentlemen of the jury that this discussion between court and counsel is none of your concern. You had no right to pay any attention to it, have no right to be influenced at all one way or the other by this discussion between counsel and the court. The court was just trying to get the counsel's point of view. Anything the court has said must be disregarded by you. You understand that, gentlemen. Very well. Whatever the court says on the law in the case will be said to you in writing, and otherwise you must not pay any attention to it.

(Mr. Nicholson concludes opening statement.)
(Opening statement by Mr. Corman.)
(Court and counsel confer privately.)
Mr. Nicholson: I am a little afraid that the remarks that your Honor made -
The Court: I can't help it, I can't help it. I tell you frankly I am going to give you an opportunity in this case - why it would be absurd, it would be absurd to talk about a case of this kind.
Mr. Nicholson: I cannot understand.
The Court: The street car has got a right to run on that track.
Mr. Nicholson: Not against anything.
The Court: Why, the streets are there for the street car to run on the track, that is the place it has got to run.
Mr. Nicholson: It is there for other vehicles as well.
The Court: I don't care, I am not going to spend any time on it if you haven't anything more than that.
Mr. Nicholson: I desire to preserve an exception."

Subsequently, and before any witness was called, the trial judge informed counsel for the plaintiff that he would allow him to withdraw a juror, and, then proceeded to address the jury, telling them to disregard certain matters which had been discussed between the court and counsel. Two occurrence witnesses were called by the plaintiff, Nellie and Percy N. Chapman.

Nellie Chapman testified that about 8:15 P.M. October 12, 1917, she was riding in an automobile north on Crawford avenue, Chicago, a north and south street; that she was sitting with three other persons, Mr. Chapman being at her right, Mrs. Parrott at her left and Mrs. Griffenham at the left of Mrs. Parrott; that Mr. Parrott was driving the automobile; that when the automobile reached North avenue as it was going north on Crawford avenue, she saw a street car just ahead; that when the street car reached Wabansia avenue, it stopped and the automobile stopped until the car started; that then the automobile went ahead and passed the car so that after they left Wabansia avenue and up to the time the automobile reached the viaduct north of Wabansia avenue the street car was behind the auto-

mobile; that the automobile went straight north until just before reaching the viaduct when they overtook another automobile; that the automobile in which she was turned toward the street car track to pass the other automobile; that the latter automobile stood at the curb and was 150 feet south of the viaduct; that Crawford avenue was paved with brick all the way; that she did not see anything of the accident; that she just felt a bump, felt the machine tipping, and then became unconscious; that when she came to Mr. Chapman was picking her up; that he put her on the sidewalk and then carried Mrs. Griffenham and put her in the machine; that she noticed Mrs. Parrott, the plaintiff; that she was covered with blood; that she was taken to the hospital; that she saw her there in bed about five weeks afterwards; that she saw her at her home about nine weeks after that and that she was lying down on a couch; that when she talked her mouth went up on one side and that one of her eyes was open wide and the other only half open; that that was the condition of her eyes all the time she was there.

On cross-examination she testified that the curtains on the machine were drawn and the only opportunity of looking out was through the front of the machine and through the back; that there was a small isinglass in the rear curtain; that she, herself, was facing north which was the direction the machine was going; that she could not tell how close they were to the street car track; that at the time of the stop at North avenue, there was another automobile in front of the one she was in and that it started up when the street car did; that the street car stopped at Wabansia avenue after leaving North avenue; that the auto-

mobile that had been ahead of the one she was in was ahead of the street car and when the street car stopped at Wabansia avenue there was no automobile between the automobile she was in and the street car; that after the street car starting at Wabansia avenue going north the automobile she was in passed the street car; that she does not remember whether it was at Wabansia or some distance after they passed Wabansia avenue that the automobile she was in passed the street car before they got into the viaduct; that at Crawford avenue north of Wabansia avenue after they had passed the street car the automobile she was in turned to the west and passed an automobile that was standing about 150 feet south of the viaduct; that after the automobile she was riding in had passed the street car and the standing automobile it did not turn back towards the east but when straight ahead so that from 150 feet south of the viaduct up to the viaduct they went right straight turning neither to the right nor to the left; that as the automobile she was riding in came under the viaduct and got about near the top she felt a tipping sensation and then heard a crash.

On examination by the court she testified that she did not know how many feet it was from where the automobile was standing still to the place where they heard the crashing; that there was no vehicle under the viaduct north of the one they passed; that there was nothing to prevent the automobile in which she was riding after passing the automobile that was standing still from going back towards the curb and getting away from the street car track.

The witness Percy R. Chapman, an accountant, who lived at 920 North Ridgeway avenue, testified that he was in the automobile on the right hand side in the rear seat;

that at the time of the accident they were driving on Crawford avenue near Wabansia avenue; that the viaduct is about a block north of Wabansia avenue; that the collision occurred at the top of the incline just after they had come out from under the viaduct to the north of the viaduct; that the viaduct is about a block north of Wabansia avenue; that he first saw the street car when it stopped at North avenue; that at North avenue the automobile he was in was behind the street car up to Wabansia avenue and the automobile passed the street car at about the junction of Wabansia and Crawford avenue; that the street car was just starting up when they passed it; that at that time he noticed an automobile standing at the curb; that they passed that automobile on its left side; that the distance between the viaduct and the standing automobile was about 300 feet; that the viaduct from the south side to the north side was about 100 feet; that the incline commenced about 25 or 30 feet south of the edge of the viaduct and ended about the same distance on the north side; that the deepest part of the depression of the viaduct was probably 2½ to 3 feet; that when they passed the standing automobile that they turned out slightly and then continued on straight ahead; that they were going about 15 miles an hour; that he noticed that they got a bump; that he was on the right side of the machine; that he looked out; that he noticed the street car passing; that everybody in the machine started to holler; that the automobile was tipped over towards the right and rested on the two right hand side wheels; that the rear end was bumped against a tree between the curb and the sidewalk; that the wind shield and the top were gone and the radiator and tools were lying all over the street; that

afterwards the south or rear end of the street car was about 75 feet north of where the automobile was lying; that just before he felt the bump he heard no noise of any kind from the street car; that after the accident he saw Mrs. Parrott lying on the street between the track and the curb at the top of the incline, about 150 feet south of where the automobile was; that the other occupants of the machine were all lying about but close to her; that part of the automobile was entirely off the roadway and midway between the curb and the sidewalk; that Mrs. Parrott's hair was all down and there was blood all over her; that she was unconscious; that there was a light under the viaduct; that the tail light of the automobile, which was a Ford, was lighted.

On cross-examination he testified that after he got out of the automobile there were no lights on it but that when he got into the machine he noticed the lights were lit including the tail light; that he was looking in the direction in which they were going; that he could distinctly see the street car standing at the east side of Crawford avenue, south of the viaduct; that the automobile in which he was passed the street car going about 15 miles an hour somewhere between Wabansia and the viaduct; that after it passed the street car they continued about at the same rate of speed; that he did not notice any knocking or bumping or jolting of the automobile as they drove under the viaduct; that there was no vehicle under the viaduct between the street car tracks and the curb; that the only vehicle he saw was a machine that was standing still near the curb; that there was ample space between where the automobile he was in was driving and the curb and that that was so from a point 300 feet south of the viaduct up to the point of the collision; that he does not

remember which side of the automobile he was thrown out on; that the engine part of the machine was towards the north, slightly turned and lying against a tree; that the point where he heard the crash was at the top of the incline, 25 or 30 feet from the viaduct; that he did not give the street car a thought after they had passed it; that he did not hear the rumble of the car; that it was about 250 or 300 feet to the place where they passed the standing automobile to the point where the collision occurred; that the automobile traveled probably 500 or 600 feet from the point where they passed the standing automobile to the point where the accident occurred; that he noticed no particular difference in the space between the track and the curb and the place where they passed the automobile to the point of the accident; that there was nothing to prevent the automobile from going back toward the east and driving in the roadway ten feet from the street car track.

On re-direct examination he testified that after having passed the standing automobile at the curb and driving towards the north the west wheels of the automobile he was in were about a foot and a half from the east rail of the street car track.

On re-cross examination he testified that he could see the street car rail and the curb; that the machine was enclosed all around and there were curtains with celluloid windows, celluloid openings.

At the close of the testimony of Chapman, the accountant, there was some discussion between the trial judge and counsel for both sides, the trial judge apparently being of the opinion, with his view of the law, that the plaintiff

would not be able to make out a case. Counsel for the plaintiff requested the clerk to swear another witness, the man who sat beside the driver of the automobile. There was then further private discussion between the trial judge and counsel, and the trial judge then said:

> "The plaintiff rests. Give me a verdict. I may state for the benefit of the jury in this case that the court is of the opinion that the defendant is not liable under any circumstances for this accident, upon the ground that there is no negligence by the Street Car Company, for they were on their tracks, where they had a right to be, and this automobile had ample space, and ample room, to run under that viaduct, and had no business to go up near the street car track, so that it might be struck by the overhang."

Pursuant to the instructions of the court, the jury then brought in a verdict of not guilty and judgment was entered thereon. From that judgment this appeal was taken.

It is contended by counsel for the defendant that counsel for the plaintiff after the close of the testimony of Chapman, the accountant, admitted that the additional proof which he was about to offer was substantially cumulative and made no affirmative objection to the ruling of the trial judge, which was practically to the effect that further evidence could be supererogatory and that, therefore, the sole issue of this appeal is whether the evidence in the record tends to prove all the elements essential to liability. It would occupy too much space in this opinion to set forth even a resume of the discussion between the trial judge and counsel which that subject involves. Suffice it to say, it appears to us, that from the beginning of the opening statement of counsel for the plaintiff, the trial judge was of the erroneous opinion that there could be no recovery if the auto-

mobile was at the time driven on the street car tracks or near them, and, by reason of that opinion, hampered counsel for the plaintiff in the proper trial of his case, and at the close of the testimony of Chapman, the accountant, may be said practically to have refused, against the expressed will of counsel for the plaintiff, to allow the introduction of further competent evidence on behalf of the plaintiff. We do not rest our decision, however, on that ground alone.

It is contended on behalf of the plaintiff that the evidence which was introduced on her behalf justified, under the law, submitting it to the jury.

The evidence tends to show that the plaintiff was injured as a result of the automobile in which she was riding as a passenger being struck by the defendant's street car and thrown over. The evidence also tends to show that the speed at which the automobile was going when it was struck was reasonable under the circumstances, and that shortly prior thereto the tail light of the automobile was lighted. It is true that the evidence shows, also, that there was space in the street under the viaduct to the east of the car tracks where the automobile might have been driven with entire safety. Of course, it does not follow from the fact that it was being driven north either close to or upon the tracks, that that was in itself negligence. The evidence also shows that the collision occurred with such force that the automobile was driven or thrown north and east so that the rear end was against a tree between the curb and the sidewalk, the wind shield and the top taken off and, as one of the witnesses says, the radiator and tools lying all over the street. Also, that when the street car stopped, its south end was about 75

feet north of where the automobile was lying.

Nellie Chapman testified that she did not see anything of the accident; that she just felt a bump, felt the machine tipping, and then became unconscious. Mercy R.Chapman testified that when they passed the standing automobile they turned out slightly and then continued on straight ahead; that they were going about 15 miles an hour; that he noticed that they got a bump; that he was on the right side of the machine; that he looked out and that he noticed the street car passing; that everybody in the machine started to holler; that the automobile was tipped over to the right and rested on the two right hand side wheels; that just before he felt the bump he heard no noise of any kind from the street car; that after the collision the south or rear end of the street car was about 75 feet north of where the automobile was lying; that he did not notice any knocking or bumping or jolting of the automobile as they drove under the viaduct.

The fact that Chapman says he "noticed we got a bump, *** and I looked through the side, I was on the right hand side of the machine, and I looked this way (indicating) and I seen the street car was passing us, and everybody in the machine started to holler, and I didn't remember anything until I stopped sliding" is not surprising, considering the situation. When the collision occurred there would be a perceptible time in which he might have seen, before the automobile was thrown over, the moving street car.

With the evidence as it is there does not seem to be any obvious reason for attaching blame or charging negligence

to the plaintiff; while on the other hand, considering the collision and its cause, as shown by the evidence that was actually introduced, it may be that in driving the street car and overhauling and running into the automobile, which it is said was going at a reasonable rate of speed, the motorman was guilty of negligence.

Of course, it may be that it can be shown that there was fault on the part of the driver of the automobile or on the part of the plaintiff, or both, but in determining the matter that is here involved we are bound to reason only concerning the evidence which has been introduced, and that evidence, we are of the opinion (1) tended to prove liability on the part of the defendant and (2) was sufficient to justify its submission to the jury. Libby, McNeill & Libby v. Cook, 222 Ill. 206.

Owing to the errors committed by the trial judge, and believing that the plaintiff did not have a fair trial, the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

O'CONNOR, P.J. AND THOMSON, J. CONCUR.

54 - 25819

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

ALEX. FILIMON,
Plaintiff in Error.

222 I.A. 656

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the defendant Filimon seeks to reverse the judgment of the Municipal Court of Chicago finding him guilty of contributing to the delinquency of children and sentencing him to the House of Correction for one year and fining him $200.00 and costs.

The complaint charges that the defendant "did unlawfully, knowingly and wilfully encourage and cause, abet or connive to cause the dependency or delinquency of the said Annie Kasaitis, a female child of the age of ten years old, did then and there wilfully do acts that did directly produce, promote and contribute to the dependency or delinquency of the said Annie Kasaitis, in violation of an Act passed by the Illinois General Assembly in force and effect July 1, 1917." It is first urged in support of this writ of error that the complaint is fatally defective in that no law was passed by the Illinois General Assembly in 1917 but that the law in effect at the time of the offense alleged in the complaint, was passed in 1915. The point is without merit. The complaint sufficiently identifies the law alleged to have been violated.

Although no statute on this subject was passed by our legislature in 1917, the law which it did pass in 1915 was in full force and effect at the time this offense was alleged to have been committed and was in force and effect July 1, 1917. Very plainly, it is the law, with the violation of which, the defendant is charged. It is next urged that the complaint is fatally defective in that it fails to allege that the child in question was under the age of 18 years. Counsel argue that the child could be over 18 years old and still be 16 years of age. That contention is without merit. It bears no analogy, as argued by defendant's counsel on oral argument before this court, to questions involving accurate allegations as to venue. It is also contended that the complaint fails to charge a crime and does not follow the language of the statute. The complaint might have been more accurately drawn but in our opinion it does charge a crime and its language is not such as to make it void. It might be said that the complaint here involved is double but in the absence of a motion to quash that point cannot be raised by the defendant now. The People v. Kingsannon, 276 Ill. 251. This information contains all the essential elements of the offense of contributing to the delinquency of a child, though they are to some extent defectively stated. Such an information will be sufficient to sustain a finding of guilty and judgment thereon. The People v. Weber, 162 Ill. App. 102.

The defendant in this case entered a plea of guilty. It is now contended that the record fails to show that the defendant was advised of the effect and consequences of his plea. The amplified record recites that "said defendant being duly advised by the court as to the effect and consequences of said plea, and said defendant still persisting therein, the

Although no trouble on this subject was passed by the Judiciary Committee in 1917, the law which it did pass in 1918 was in full force and effect at the time that affiant was alleged to have been convicted and was in force and effect July 1, 1919.

Very plainly, it is the law, with the violation of which, the defendant is charged. It is most unfair that the prosecutor is rabidly interested in that it fails to allege that the child in question was under the age of 18 years. Counsel argue that the child could be over 18 years old and still be 16 years of age. That contention is without merit. It begs the analogy, as argued by Commonwealth counsel on oral argument before this court, in questions involving statutory allegations as to women. It is also contended that the complaint fails to charge a crime and does not follow the language of the statute. The complaint might have been more accurately drawn but in our opinion it does charge a crime and its language is not such as to make it void. It might be said that the complaint here involved is similar to the indictment, a section of which point counsel do relate by the reference made. Commonwealth v. Fitzgerald, 177 Ill. 467. This indictment has been all the essential elements of the offense of contributing to the delinquency of a minor, though one who is not minor referentially stated. Such an information will be sufficient to sustain a finding of guilty on treatment charges. The People v. Baker, 198 Ill. App. 126.

The defendant in this case entered a plea of guilty. It is now contended that the "people" fail to show that the defendant was advised of the effect and consequences of his plea. The majority rule requires that "such defendant must duly waived by the waiver of a by the effect and consequences if such plea, and such information fail, investigation, the

court orders said plea to be accepted and entered of record against said defendant." There is in the record what is known as the "half sheet" which purports to be a record of all papers filed and writs issued and also all orders entered by the trial court. The point urged by the defendant is that, although the half sheet recites that the defendant was arraigned and that he entered a plea of guilty, it does not recite that the defendant was warned as to the effect and consequences of his plea and that inasmuch as the half sheet contains no such recitation, there is no basis for the statement in the amplified record to the effect that the defendant was warned as to the effect and consequences of his plea.

In our opinion this contention is not tenable. The "half sheet" purports to contain nothing except the papers filed in the cause, the writs issued and the orders entered. A recitation of the fact that the defendant was advised as to the effect and consequences of his plea comes under neither of these heads. On a motion by the defendant to expunge from the record, the recitation that the defendant was so advised, certain evidence was heard from which it appears that the record is made up from the half sheet. If the half sheet contained the only original notations from which the record is made up, the point here made by the defendant might be well taken. But not only is that not shown by the record but, on the contrary, the record of the evidence heard in connection with the motion referred to, discloses that the court examined a document referred to as "Exhibit E" which is described as "a book for use in making up records" and the recitation in the record which it was sought to expunge is described as "an extract from said book referred to as Exhibit E."

The

might E."

record contains nothing further to explain the purport of "Exhibit E". There is a sentence appearing in the record, written in long hand as an insert, as follows: "Exhibit E is a book for use in making up records and paragraph 5a on page 5 in each transcript of record in an extract from said book referred to as Exhibit E and a copy of said order." This appears as a statement of counsel to the trial court. It is not a part of the testimony. There is not sufficient evidence in the record to warrant this court in reaching a conclusion as to just what that exhibit contained. We must assume, in such state of the record, that its contents were such as to warrant the court in denying the motion to expunge and to support the record in its recitation to the effect that the defendant was advised as to the effect and consequences of his plea.

We find no error in the record and the judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

55 - 25820

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO
v.	MUNICIPAL COURT OF CHICAGO.
ALEX. FILIMON, Plaintiff in Error.	

MR. JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the defendant Filimon seeks to reverse the judgment of the Municipal Court of Chicago finding him guilty of contributing to the delinquency of children and sentencing him to the House of Correction for one year and fining him $200 and costs.

This cause was consolidated for hearing in this court with case No. 25819 in which we are this day filing an opinion. The issues involved in the case at bar are the same as those in case No. 25819 and we shall therefore not repeat here what we have set forth in the opinion filed in that case. For the reasons there set forth the judgment of the Municipal Court in the case at bar is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

the court.

By this writ of error the defendant Williams seeks to reverse the judgment of the municipal court of Dallas finding him guilty of contributing to the delinquency of children and sentencing him to the figure of incarceration for one year and fining him $500.00 costs.

This cause was consolidated for hearing in this court with case No. 22819 in which we have only filing an opinion. The issues involved in the case at bar are the same as those in case No. 22819 and we shall therefore not repeat here what we have set forth in the opinion filed in that case. For the reasons there set forth the judgment of the municipal court in the case at bar is affirmed.

Affirmed.

68 - 25838

ARTHUR B. GREENWOOD, Administrator of the Estate of Clarence Eddy, Greenwood, Deceased, Appellant,	222 I.A. 550
v.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
JOHN H. THOMPSON CO., a corporation, Appellee.	

MR. JUSTICE THOMSON delivered the opinion of the court.

This case was formerly before this court on the pleadings, at which time the cause was reversed and remanded (213 Ill. App. 371) and thereafter the issues were made up and a trial was had before a jury resulting in a verdict finding the defendant not guilty and a judgment for the defendant was duly entered, to reverse which, the plaintiff has perfected this appeal.

This was an action on the case for damages, the plaintiff alleging in his declaration, in substance, that the defendant conducted a restaurant and breached its implied warranty that its food was wholesome, by selling to plaintiff's intestate, certain food which was "unwholesome, poisonous, dangerous and unfit to be eaten," and that as a result of eating such food, the plaintiff's intestate became sick and died.

In support of this appeal, the plaintiff first urges that the judgment for the defendant should be reversed and the cause remanded for a new trial because of the conduct of the trial court. It is contended that the court prejudiced

its examination of the whole case, the opinion of this court is that the conduct of the trial court complained of, did not operate to the prejudice of the plaintiff's case, or that, in any event, no verdict could have properly been returned by the jury, on the evidence submitted, other than the one which was returned. Of course it would be quite impossible for this court to determine that question from the abstract filed herein by the plaintiff.

Moreover, in pointing out the instances of the alleged misconduct of the trial judge, of which plaintiff complains and which he contends prejudiced his case, counsel confines himself, in his brief, to a few such instances and then refers to such conduct which he alleges the court committed, "at various other times", throughout the trial, and then he says he will not make further comment, "except to say all such breaches of etiquette and rules were not fully abstracted as it would make the expense too much." It goes without saying that in reviewing acase this court cannot supply what the thrift of the appellant or his counsel fails to give. It is a familiar rule of appellate court practice that a reviewing court will not search the record for errors in support of a finding reversing the judgment reviewed.

It is also a familiar rule of appellate practice, as plaintiff points out in his reply brief, that if appellee is not satisfied with the abstract prepared by appellant, he may prepare such additional abstract as he deems necessary to a full understanding of the question presented. But that rule has no application to such a situation as that presented by the abstract filed by the plaintiff in the case at bar.

The summations of the whole case, the opinion of Judge Smith is that the conduct of the trial court complained of, did not operate to the prejudice of the plaintiff's case, or that, in any event, no verdict would have properly been returned by the jury, on the evidence adduced, other than the one which was returned. Of course it would be quite impossible for this court to determine that question from the abstract filed herein by the plaintiff.

Moreover, in pointing out the inconsistency of the minute misconduct of the trial judge, of which plaintiff complains and which he contends prejudiced his case, counsel confines himself, in his brief, to a few such instances and then refers to such conduct which he alleges the court committed, "at various other times", throughout the trial, but then he says he will not make further comment, "except to say that such expressions of regret and rulers were not fully appreciated as it would seem the language too much." It goes without saying that in reviewing cases this court cannot supply what the brief of the appellant or of his counsel fails to give. It is a familiar rule of appellate jury practice that a prejudicial error will not merely the record for errors in support of a finding overturning the judgment rendered.

It is also a familiar rule of appellate practice, as plaintiff points out in his reply brief, that if objection is not satisfied with the abstract rendered by appellant, he may direct such additional abstract as he deems necessary to a full understanding of the question presented. But that rule has no application to such a situation as that presented by the abstract filed by the plaintiff in the case at bar.

the plaintiff's case by repeatedly interrogating the witnesses and that the remarks, statements and action of the court, in the presence of the jury, so prejudiced the plaintiff's case before the jury, that the plaintiff did not secure a fair hearing. In connection with this point, it should be noted that the defendant duly filed its motion to affirm the judgment of the Superior Court, because of the failure of the plaintiff to comply with Rules 18 and 19 of this court, which motion this court reserved to the hearing. An examination of the abstract discloses the fact that much of the evidence has not been abstracted at all. It was the contention of the defendant that the death of plaintiff's intestate was due to meningitis and that it had no connection with the food he had eaten, and that these facts were abundantly established by the evidence. In support of that contention, the defendant introduces the testimony of five doctors. Their testimony covers nearly one hundred pages of the record but the abstract has but four pages devoted to that testimony and over two of those pages are necessary to give a hypothetical question put to the first medical witness and his answer thereto. It is evident from the paging noted on the margin of the abstract, that the direct testimony of the defendant's witness, Dr. Mix, covers twelve pages of the record while the abstract devotes but four lines to that testimony, and that the cross-examination of this witness, covers ten pages of the record and the abstract gives not a word of it. Further it appears that the testimony of the defendant's witnesses, Drs. Loewy, Kendall and Davis, occupies pages 277-300, in the record, but the abstract gives none of it at all.

It is a familiar rule that even though a trial court may have committed such errors as those here urged by the plaintiff, this court will nevertheless affirm the judgment, if, by

A full consideration of such error as the plaintiff urges, necessitates a consideration by this court of all the testimony, for the reasons we have pointed out. He cannot be permitted to abstract the testimony of an expert witness, who testified on the important issue of whether, in his opinion, the deceased came to his death as a result of food poisoning or meningitis, by merely having the abstract advise this court that the witness testified he was "a bacteriologist" without giving another word of his testimony and then to hide behind the rule which provides that if the defendant deems this testimony important, he may prepare an additional abstract covering it.

But it is urged by the plaintiff that the action of the trial judge was such that the plaintiff did not receive a fair trial "regardless of the evidence and what it tended to prove." The conduct of the trial judge cannot be urged as prejudicial, "regardless of the evidence and what it tended to prove." No matter what the conduct complained of may have been, if, in the opinion of this court, no other verdict than the one returned by the jury, could be upheld on the whole record, the conduct cannot be considered prejudicial. Plainly the abstract filed by the plaintiff was not "sufficient to fully present every error and exception relied upon," and it therefore failed to comply with the rules of this court.

But, rather than allow the motion of the defendant, we have preferred to examine plaintiff's contention on the merits and we have therefore examined all the evidence as set forth in the additional abstract filed by the defendant as well as that set forth in the abstract filed by the plaintiff, and irrespective of the propriety of the various acts and comments

of the trial court, complained of, our opinion is that they cannot be considered as having prejudiced the plaintiff's case, for the reason that on the whole evidence, no verdict other than one of "not guilty" could possibly be sustained.

The plaintiff further contends that the trial court erred in permitting the president of the defendant corporation to testify as to whether any other cases of poisoning happened in any of his restaurants, at the time when it was contended plaintiff's intestate had suffered such an experience. One article of food eaten by the plaintiff's intestate, which it is contended poisoned him and brought about his death, was sausages. It was in evidence that the commissary of the defendant's restaurants, including the one in question, received a fresh supply of sausages every day except Sunday, and were distributed to the various restaurants twice a day; that practically without exception, no sausages remained in the commissary over night; that in the case of the restaurant involved, the sausages received from the commissary were used up every night; that on the day in question, (which was Saturday) this restaurant received 25 pounds of sausages from the commissary for use that day and the next. Under those circumstances, the evidence complained of was proper. Luetgert v. Volker, 153 Ill. 385.

Finally, the plaintiff contends that the trial court erred in refusing an instruction which he tendered. As to this contention it is sufficient to point out that according to the wording of the instruction itself, as tendered by the plaintiff, it was only to be applied by the jury, "if you find the plaintiff is entitled to any damages." The refusal of this instruction could not have harmed the plaintiff, for by the verdict returned,

of the trial court, complained of, our opinion is that they cannot be considered as having prejudiced the plaintiff's case, for the reason that on the whole evidence, no verdict other than one of "not guilty" could be possibly be sustained.

The plaintiff further claims that the trial court erred in permitting the production of the defendant corporation to testify as to whether any other cases of poisoning happened in any of his restaurants, at the time that it was mechanical plaintiff's intestinal tract ruptured and he sustained. One article of food eaten by the plaintiff's husband, which it is undisputed claimed she had injured herself all ready, was sausages. It was in evidence that the sausages of the defendant's restaurants, including the one in question, received a fresh supply of sausages every day one at lunchy, and were distributed to the various restaurants twice a day; that practically without exception, no sausages remained in the sausage every night; that in the case of the restaurant involved, the sausages received from the commissary were used up every night; that on the day in question, [which was February] this restaurant received 88 pounds of sausages from the commissary for use that day and the next. Under these circumstances, the evidence complained of was proper. Hawkins v. Tilden, 184 Ill. 348.

Finally, the plaintiff claims that the trial court erred in refusing an instruction which he tendered, as to this contention it is sufficient to point out that according to the wording of the instruction itself, as tendered by the plaintiff, it was only to be applied by the jury, "if you find the plaintiff is entitled to any damages." The refusal of this instruction could not have harmed the plaintiff, for by the verdict rendered,

the jury found that the plaintiff was not entitled to any damages.

For the reasons stated, the judgment of the Superior Court is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

200 - 25972

GEORGE W. ROSSETTER,
Appellant,

v.

THE LIBRARY PRESS, a corporation,
Appellee.

222 I.A. 656

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Rossetter, filed his statement of claim in the Municipal Court of Chicago, alleging that he was employed by the defendant corporation as chief executive and general manager of its business, from April 1, 1916 to September 1, 1917; that the defendant agreed to pay him $300.00 per month during such time as he should be in defendant's employ; that this salary was paid him up to and including June 1917; that he fully performed all the obligations to be performed by him under said agreement during the months of July and August 1917, but that the salary stipulated in the agreement sued on had not been paid him, wherefore plaintiff brought his suit for $600.00.

By its affidavit of merits, the defendant denied that plaintiff, during the two months in controversy, had fully performed all the obligations on his part to be performed under the terms of the agreement of employment, and the defendant declared that it was therefore not indebted to the plaintiff in any amount.

the law.

The liability, however, then has a maximum of claim in the Industrial Court of Chicago, although this is be was employed by the different motorcycles we other conveyed and imposed manner of its business. Then Lamar A. Hill in Septembre 1, 1917, that the intentional against to any the Effective per remain motion shall also be obtain in is the Industrial motion: that this order may will has or in was Machinery from 1917; that Dr Fully intentions all for claims claim to be authorized by the motor well accident during the course of fully and August 1917. for that the motor vehicle in the approved road in the for this and, directly plaintiff through the full the Chicago.

By the without or motor, the attorney state that plaintiff, making all the needs it motorcycle, the fully partners all the obligations in the part it to make formed made the that of the measure of motorcycle, the the contrary knowing that if not the driver was liable in the liability in my house.

The parties waived a jury and the issues were submitted to the court, resulting in a finding for the plaintiff. The court then entered judgment for the plaintiff in the sum of $300.00. The plaintiff, not being satisfied with that judgment, has perfected this appeal.

In support of his claim, the plaintiff testified to his employment by the defendant as its secretary and treasurer up to the early part of 1917 when he was made its president at the same salary he had previously been receiving which was $300.00 per month, and that this salary had been paid him up to July 1, 1917. He further testified that during July and August of that year his duties as president of the defendant company were "exactly the same as the preceding several months" and he went into these duties in his testimony, in some detail. On August 27, the plaintiff entered an Officers Training Camp at Fort Sheridan. He continued to sign checks in payment of defendant's accounts and visited the offices of the Company on week ends and he testified that he continued to supervise its business, up to about September 10, 1917. He testified further he "was there all of the time during July and August", and devoted all his time to defendant's affairs; that there were possibly a few afternoons or a few hours of a few days during these two months when he was not there, when he was engaged in some activity having to do with the Fort Sheridan Training Camp Association; that he did not feel he was entitled to receive any salary beyond September 1, 1917. It appears that the majority stockholder in the defendant corporation was Mr. Ernest Gundlach and that beginning sometime in June 1917, there was considerable negotiation looking toward a reorganization of the company, under which the accounts on

the books of the company, as of June 30, 1917, were to be the property of the company and accounts acquired after that date were to go to the purchaser of the defendant's business; that the plaintiff was endeavoring to buy out Gundlach's interest, either alone or with others, but that this was never accomplished. There is some contention by the defendant that the plaintiff resigned as its president but there is no proof in the record to substantiate it.

In further support of the plaintiff's case, a Miss Johnson testified she was employed in the office of the defendant during July and August, 1917, and that throughout these months the plaintiff was there most of the time,- in and out of the office; that he conducted himself just as he had prior to that time; that the work he did during those months was the same as he had done in the prior months and that after he went to the Officers Training Camp he returned to the office Saturday afternoons "and conducted the business of The Library Press."

For the defendant, one Johnson, testified that he had charge of defendant's office from February 1 to August 11, 1917, under the plaintiff's directions; that he left on the latter date "because there was no work to be done"; that the plaintiff "would spend an average of two or three hours there, a day." The testimony of this witness would seem to be to the effect that this was true, not merely after July 1, but during all the time the witness was connected with the defendant. The witness testified that the plaintiff had a private office in the defendant's place of business and that he did "not know what he was doing there; he was in his private office, when he was there, most of the time"; and that to the best of his recollection, the plaintiff gave him no instructions or directions in connec-

the books of the company, so of course not, but, when it be
the property of the company are somewhere possible also
this also be in the possession of the plaintiff's witness
that the plaintiff was conversing in my car immediately be-
tween, either alone or with others, but that this was never
accomplished. There is some confusion in the evidence and
the plaintiff resigned on his production but there is no clear
is the record to substantiate it.

At further request of the defendant's counsel, a
also former employee who was employed in the office of the
defendant during July and August, 1927, and that throughout
these months the plaintiff was quite good of the time. He
was out of the office; that he conducted himself in a
his point to that time; that he was in all during those
months was the more so in the end that it for quite some
time after he was in the company; that he intoxicated
in the office habitual offenses "and endangered the business
of the company time."

For the defendant, one Fleming, testified that he was
charge of defendant's office for Mr. Hyman; I to recall it, that,
after the plaintiff's discharge; that to that as the larger
this "because there was no work to do there; that the claim-
ant really spent a struggle to do it that time; that a mis-
the statement of this witness could not be to the effect that
this was true, not merely after July 1, but during all the time
the witness was associated with the defendant. The witness
testified that the plaintiff had a private office in the de-
fendant's place of business and that he did "not know what he
was doing there; he was in his private office; when he was there,
most of the time"; but that if the "had if the availability.
the plaintiff was also an employee of the defendant in

tion with the defendant's business. On cross-examination this witness testified that at times the plaintiff "discussed the conduct of the business with me,- he had complete control and management of the business."

Mr. Gundlach also testified but his testimony had to do almost entirely with the negotiations which were pending during the summer of 1917, for the sale of his stock and a reorganization of the defendant corporation.

In opposition to the plaintiff's contentions on this appeal, the defendant urges that the only question the plaintiff raises, relates to the measure of damages adopted by the trial court in fixing the amount of the judgment entered for the plaintiff; that this is a question of law, and that, inasmuch as the plaintiff submitted no propositions of law to the court, there is no question upon which this court can properly pass. With that contention we do not agree. The question before this court on this appeal, is one of fact,- as we understand the plaintiff to urge by his brief,- namely did the plaintiff perform his contract of employment, as alleged by him in his statement of claim, or did he not do so, as contended by the defendant, in its affidavit of merits. The plaintiff did not declare on a quantum meruit for the reasonable value of services performed, nor could he have done so. He had an express contract of employment at a stipulated salary per month. If he performed the duties incident to that employment, he was entitled to the agreed salary. If he failed to perform those duties, he would not be entitled to it. As the trial court suggested several times during the hearing of the testimony, it would seem that if the plaintiff was failing to perform his duties, the natural thing for the stockholders to have done was to take the appropriate action and

terminate the contract of employment. The fact that they did not do so, would seem to indicate that such was not the situation. The fact that there were some negotiations going on, in which the plaintiff and Gundlach were interested, does not affect the case.

On the only issue presented to the trial court,- namely, the issue of fact as to whether or not the plaintiff had performed his contract of employment, one point urged by the defendant is that the plaintiff did not devote his entire time to its business. In the first place, it no where appears that the agreement required that he should. The defendant's own testimony would seem to indicate the contrary, for their witness Johnson, as we read his testimony, said that during his period of employment, (which covered some months previous to July 1, as well as some weeks after that date) the plaintiff was only at the office a few hours a day. He further testified that he did not know what the plaintiff was doing when he was not at the office. Miss Johnson's testimony is to the same effect,- that what the plaintiff did after July 1, was just what he had done previous to that date. The plaintiff testified he devoted all his time to the defendant's business, during the two months in question, except a few hours on several days when he was engaged in some matter having to do with the Fort Sheridan Training Camp Association.

One or two other points, involving the testimony, are urged by the defendant but in our opinion without support in the record. Their main witness Johnson did not know what the plaintiff was doing while he was in the defendant's place of business, for during most of that time he was in his private office where Johnson could not observe him.

terminate the contract of employment. The fact that they did not do so, would seem to indicate that such was not the situation. The fact that there were some negotiations going on, in which the plaintiff was involved more interested, does not affect the case.

In the only disagreement of the facts shown, namely, the issue of fact as to whether or not the plaintiff had performed his contract of employment, was raised by the contention in that the plaintiff did not devote his entire time to the business. In the first place, it is there appears that the agreement required that he should. The evidence shows the testimony which was in dispute, but that evening his period of employment, (which covered some months previous to July 1, as well as some days after that date) the plaintiff was only at the office a few hours a day. He further testified that he did not know that the plaintiff was doing work in his at the office. Mrs Simmons's testimony is to the same effect, that that the plaintiff did after July 1, was just what he had done previous to that date. The plaintiff testified he devoted all his time to the defendant's business, during the ten months he worked, and a few hours on several days when he was engaged in some other matter, so as with the full knowledge that he was.

The at the trial period, including the [illegible], are vague by the evidence but in any events without objection in the record. That such evidence [illegible] and that the plaintiff was doing work for the defendant's [illegible] of business, he [illegible] at first sight to be a [illegible] affirmative defense [illegible] and [illegible].

In our opinion, it is clearly established by the evidence that the plaintiff did perform his contract of employment covering the two months in question.

It appears from the record that the court concluded from the testimony that the plaintiff performed what amounted to half the service called for by his agreement, covering the two months in question. In our opinion such a finding is against the manifest weight of the evidence.

For the reasons given, the judgment of the Municipal Court is reversed. As the parties waived a jury and submitted the cause to the court, this court has the power to enter judgment for the plaintiff in this court. T.S. Hill Co. v. U.S. Fidelity & Guaranty Co., 184 Ill. App. 528; Manistee Lumber Co. v. Union National Bank, 143 Ill. [illegible] 490; Thompson v. Frelinghuysen, 191 Ill. App. 204; Hemingway Company v. Keagle, 131 Ill. App. 5; O'Farrell v. Vickerage, 184 Ill. App. 343. Therefore, judgment is entered in this court, for the plaintiff for the sum of $600.00.

JUDGMENT REVERSED AND JUDGMENT HERE.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

As our readers, it is thanks exclusively to the [illegible] that the economist [illegible] of [illegible] disposed towards the media is [illegible].

[illegible] Even the [illegible] that in [illegible] [illegible] from the [illegible] [illegible] [illegible]

312 - 26084

222 I.A. 657

FREDERICK S. OLIVER, doing business as Oliver & Company, Appellees, v. INLAND PRINTER COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant corporation seeks to reverse a judgment for $845, recovered by the plaintiff in the Municipal Court of Chicago, after a verdict had been returned by a jury, finding the issues for the plaintiff and fixing his damages at that amount.

In his statement of claim the plaintiff alleged that defendant was the lessee of a building, describing it, and that it listed certain floors of said building with the plaintiff, for rental; that through the efforts of plaintiff, Buckley, Dement & Co. were procured as a tenant of that space; and that the usual and reasonable commission of the agent in such case is $845.00. By its affidavit of merits, the defendant contended that Buckley, Dement & Co. were not procured as tenants of the space in question through any effort of the plaintiff. It was nowhere denied, either in the pleadings or the evidence, that the space referred to had been listed for rental with the plaintiff by the defendant.

In support of the plaintiff's case, one Aronson testified, that, as an employee of the plaintiff, he showed

the space to Mr. Buckley and Mr. Dement in March 1917, at which time they had examined it in some detail; that they raised objections about the light; that he told them the floors would have to be cleaned and the glass changed to clear glass, and so on; that they said they could not use the space in the shape in which it then was; that he assured them that it could be made suitable for their line of business with the changes he had suggested. He further testified that he saw Buckley, Dement & Co. concerning these premises, about two or three times a month for the following three months and that in December following, Buckley, Dement & Co. entered into a written lease covering the premises; that during that month he and Mr. Lang, the rental manager for plaintiff, had a talk with Mr. Hibben, general manager of the defendant corporation, on the question of plaintiff's commission, at which time Hibben said he would like to pay the plaintiff a commission, but that Friend & Company were also claiming a commission and he did not want to pay two commissions,- that if plaintiff would give him a letter holding him harmless from any claim on the part of Friend & Company, he would pay the commission but that no such letter was given and no commission was ever paid.

Lang testified that he was the manager of plaintiff's renting department at the time in question; that one Kase was the manager of the building in question for defendant and that the witness had a number of talks with him after Aronson had reported that he had submitted the space to Buckley, Dement & Co.; that he told Kase that there was a good chance of securing the latter firm as a tenant of the space if it were made more attractive; that the soot and grime of

the Queen in her, Darling and Mr. Howard in March 1917, at which time they had received it in good health; that they raised objections about the ivory; that Mr Gibbs and Jones would have to be dressed and the glass changed to other glass, and he did; that they said they could not let the queen go to the stage in public at that way; that he replied that it would be made suitable for their like of business; that he changed it and showed it; in fact, [illegible] he saw Darling, Howard & Co. concerning some jewelries, about ten or three times a month for the following three months and that in December following, Darling, Howard & Co. entered into a written lease covering the premises; that during that period Mr. Jung, who formerly managed the [illegible] had a talk with Mr. Gibbs, general manager of the defendant corporation, on the question of Jung's commission, at which time Gibbs said he would like to say that initially a commission, but that friend a Jungmay make also claiming a commission and he did not want to pay two commissions; that initially with the [illegible] Darling and Howard from any claim on the part of friend a Jungmay, he would pay the commission but that he been before the lease and no commission was ever paid.

Jung testified that he was the manager of plaintiff's jewelry department at the time in question; that one Kane was the manager of the building in question for defendant and that for whom he worked as a member of India with the office Kane had received that he had negotiated the rents to India Jay, Howard & Co.; that he said Kane told him he was a just manager of managing the jewelry department; that Kane said if it were made more attractive; that the rent was little as

fifteen years made the glass opaque and that the glass and skylights ought to be cleaned with acid and that if these improvements were made, he felt sure Buckley, Dement & Co. could be secured; that Kane said he would get some estimates but remarked about the cost and said he thought he could rent the space without incurring that expense. Lang further testified that he visited the defendant's office during the spring and summer of 1917 on an average of once a month,- sometimes twice a month; that in December, after the lease was closed, he talked with Hibben about commissions and that the latter said "We don't dispute your claim,- we are perfectly willing to pay Oliver & Company a commission but I want a letter from Oliver & Company, holding me harmless against any claim of Alexander Friend & Company, which they may have in the matter"; that the witness told him plaintiff could not do that; that there was no agreement between the parties as to the commission to be paid. It nowhere appears, what, if any, interest Friend & Company had in this matter or what connection they had with the negotiations in question. On cross-examination, Lang testified that the plaintiff represented the owner of the building, on the whole of which defendant had a lease; that he interviewed Kane about the upkeep of the entire building but that he had no less than six interviews with Kane when the leasing to Buckley, Dement & Co. was the sole topic of conversation; that these interviews kept up till late in the fall and that plaintiff never gave the matter up.

For the defendant, Mr. Dement testified about Aronson showing them the space in question in March but he said that they were not at all interested, that Aronson frequently called on them after that to rent them space in another

building; that they next heard of this space from one Boyle, late in the fall; that the witness said he had objections to the space but Boyle persisted, agreeing to make certain improvements. It appears that Boyle was treasurer of Henry C. Sheppard & Co., which occupied part of the building in question. Mr. Hibben was general manager of the defendant company and also general manager of the Henry C. Sheppard Company, and it appears that he requested Boyle to see Buckley, Dement & Co. about leasing the space in question inasmuch as he was an old time friend of both Mr. Buckley and Mr. Dement. The latter testified also that he was persuaded largely to go into this lease because of the agreement to clean the glass and put in new windows and clean the space up.

Mr. Hibben testified that in the conversation he had with Aronsen and Lang, relative to plaintiff's commission he did not "remember saying what they say I said, and the way I said it." He further testified that the first time he met Buckley, Dement & Co. was through Boyle, in November.

On that evidence, we are of the opinion that the jury were warranted in finding the issues for the plaintiff on the theory that the plaintiff was the procuring cause of the lease that was consummated between the defendant and the tenant. That the space was listed by the defendant with the plaintiff for rental, is not denied. The space was shown to the tenant by plaintiff's agent to whom the tenant stated his objections. This agent worked with the tenant for some three months. Another agent of the plaintiff took up with defendant the desirability of making the improvements mentioned by the tenant with a view to consummating this lease and these very improvements were made and the lease was closed and the

building; that they were heard of this cause from one Joyce, late in the fall; that the witness was on one occasion at the house but Joyce permitted, against to make certain improvements. It appears that Doyle was tenant of Henry C. Diamond & Co., which occupied part of the building in question. Dr. Hilyer was general manager of the Diamond company and also general manager of the Henry C. Company, and it appears that he requested Joyce to see Doyle, Lamont & Co. about leasing the space in question because he was an old time friend of both Mr. Doyle and Mr. Lamont. The jury evidently also that he was persuaded largely to go into this lease because of the agreement to clean the place and put in new windows and clean the space up.

Mr. Hilyer testified that in the conversation he had with Joyce's bad, pertains to plaintiff's complaints he did not remember saying what Joy said I said, not the way I said it." He further testified that the first time he met Doyle, Lamont & Co. was through Joyce, in November.

On that evidence, we are of the opinion that the jury were warranted in finding the issues for the plaintiff on the theory that the plaintiff was the proximate cause of the loss that was occasioned between the defendant and the tenant. That the cause was liable by the defendant with the plaintiff for rental, is not denied. The cause was where is due the tenant by plaintiff's cause is when the tenant abated his objections. This cause worked with his tenant for some three months. Implicit duty of the plaintiff but we also determine the desirability of having the improvements mentioned by the tenant also a view to recommending the lease and have the improvements were just and for later use the tenant and the

tenant testified that this result was largely due to the fact that the improvements in question were made. In our opinion the activities of Boyle cannot defeat the plaintiff's claim any more than if they had been those of Hibben, defendant's general manager, at whose request Boyle saw the tenant as a mutual friend of the parties.

The defendant urges that the trial court erred in the instructions given the jury. The court instructed the jury orally. No objection to any part of it was made by the defendant. There were some slight inaccuracies in it but in our opinion they could not have confused the jury nor operated in any way to the prejudice of the defendant.

On its motion for a new trial the defendant presented the affidavits of Hibben and Kase. The affidavit of Hibben was to the effect that he was surprised by the evidence of Lang as to his conversation with Kase; that he had previously talked with Kase who said he knew nothing about the matter in controversy prior to the making of the terms of the lease; that affiant had no time to procure the attendance of Kase in court, after hearing Lang's testimony and that on another trial affiant could produce the testimony of Kase as set forth in the affidavit of the latter. The affidavit of Kase was generally in denial of the testimony of Lang. The trial court did not err in denying the motion for a new trial notwithstanding the affidavits referred to. There was no showing that the evidence of Kase could not have been produced at the trial by the exercise of reasonable diligence. There was noshowing that when Lang gave his testimony, the defendant could not have produced Kase in court, nor did the defendant advise the

Among Australians that this legal act largely has to do just that the Legislature is question more and. In our opinion the existence of this court lodged the liability claim may more than if they had been times of libbon, defendants general manager, at whose request this the tenant or a other friend of the parties.

The plaintiff argue that the jury must prove is the landlord gave the jury. The court instructed the jury orally. No objection to any part of it was made by the defendant. There were some slight inconsistencies in it but in our judgment they could not have confused the jury nor operated in any way to the prejudice of the defendant.

In its motion for a new trial the defendant pre-
sented the affidavits of Gibbon and Kane. The affidavit of Gibbon was to the effect that he was acquainted in the evidence of long as the lease conversation will Kane; that he had previous-
ly talked with Kane who said he knew nothing about the matter in controversy prior to the notice of the tenant of the tenant that efforts had no time to produce the witnesses of Kane in court, after hearing, finally withdrew, and this by defendant legal efforts could produce the testimony of Kane or act force in the affidavit of the latter. The affidavit of Kane was plainly in denial of the testimony of Kang. The court erred not was in giving the notice for a new trial notwithstanding the affidavits referred to. There was no showing that the exis-
tence of Kane could not have been produced on the trial by the exercise of reasonable diligence. Since the testimony was cumulative and immaterial evidence. Since the testimony
Mere technical fact is equal, and all the different matter the

court that it had been surprised by the testimony of Lang and request a continuance of sufficient length to permit it to produce Kase as a witness.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

O'CONNOR, P.J. AND TAYLOR, J. CONCUR.

Term No. 9.

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

October Term, 1920.

Agenda No. 3.

First National Bank, of Newton, Illinois, Appellee. vs. Catherine N. Hayes and Leona Worthy, Appellants.	Appeal from Circuit Court Jasper County, Illinois.

Opinion by Boggs, J.

Appellee filed its bill in the Circuit Court of Jasper County Illinois, in aid of an execution for $271I.18 issued upon a judgment entered by confession in vacation on July 14, 1917, in favor of appellee and against Orlando Stewart, Hanna Stewart and appellant, Catherine N. Hayes. The note upon which judgment was confessed, was dated December 21, 1916, due six months after date, payable to the order of appellee. The principal of said note was $2500. with interest at rate of .7% from maturity. Said note contained a power of attorney to confess judgment for such an amount as may appear to be due and unpaid, together with costs and _____ dollars attorney fees. When judgment was confessed, $200. was entered in the judgment as attorney fees, plus $11.18 Interest, making a total of $271I.18. The note was described in the declaration as being dated December 21, 1917.

handed down July 8th 1921

no-rehearing asked

An execution issued on this judgment was returned with the following endorsement, "I hereby return this execution with scheduled on property found as to Catherine Hayes and I certify that said Orlando Stewart and Hanna Stewart have been adjudged bankrupts and that I delivered to Robert T. Lowell, Trustee in Bankruptcy for their estate, the property levied upon as the property of Orlando Stewary, and said trustee now controls all the property of said Orlando Stewart and Hanna Stewart."

After making the above note on the 13th day of February 1917, appellant Catherine E. Hayes, by warranty deed conveyed to her daughter, Leona Worthy, the southeast quarter of the northeast quarter; and the east half of the southeast quarter of the southeast quarter of the northeast quarter, in section 27, Township six north, range 9 east of the 3rd P.M., in Jasper County, Illinois. Reserving to grantor a life estate therein and subject also to the life estate of one John Metcalf. Said deed was filed for record March 23rd, 1917.

The consideration recited in said deed was $1.00 and love and affection. Said bill alleges that the above mentioned conveyance, by appellant Catherine E. Hayes to Leona Worthy was made for the purpose of defrauding appellee and other creditors and that the same was without valuable consideration. It also alleges that said judgment is a lien upon said lands, and prays that said deed be set aside as null and void; that said land be sold to pay said judgment and for general relief.

The answer of the appellants denies the validity of said judgment and charges that the same is void, and is not and never has been a lien on said lands; that said deed was executed in good faith for a valuable consideration and with the full

-2-

knowledge and consent of appellee, and that at the time of the making of said deed said lands were the homestead of Catherine E. Hayes.

A general replication was filed to said answer and said cause was referred to the Master to take the evidence and to report the same to the court. The evidence was taken and reported to the Master to the court without conclusions. Prior to the hearing, further evidence was heard in open court. On the hearing the court found the issues in favor of appellee and a decree was entered finding that said conveyance from Catherine E. Hayes to her daughter was in fraud of the rights of appellee as a creditor and finding the amount due appellee to be $2297. 84. It was ordered by the court that unless said amount was paid within thirty days, that said deed be set aside and said land be sold to pay said judgment, etc., after allotting and setting off to Catherine E. Hayes her homestead of $1000. therein.
To reverse said decree this appeal is prosecuted.

The evidence in chief offered by appellee consisted of the narr and cognovit, note, judgment, execution, deed, etc. and proof of the execution of the deed. The testimony on the part of appellants tended to show that said conveyance made by Mrs. Hayes to her daughter was made with the knowledge and consent of a Mr. Hirsh, president of appellee , Bank, and also tended to show by the testimony of William E. Trainer, Circuit Clerk of said county that Mrs. Hayes had stated to him on several occasions prior to the making of the deed in question and prior to the execution of the note on which judgment was taken, that she expected to convey this property to her daughter.

Mrs. Hayes also testified that she owed her daughter something like $3000.00; that "she had owed her this amount since she was small,--about twenty-six and one half years." She further testified that "her daughter worked and earned money." On rebuttal, two witnesses on the part of appellee testified that Mrs. Hayes said to them that she deeded the sixty acres to her daughter saying that she was on notes for Orlando Stewart and that if she made this deed to her daughter, they could not make her pay them. Said witnesses testified that this conversation took place in June 1917. Mrs. Hayes denied ever having had this conversation and also denied ever having seen either of these witnesses until the time of the taking of the evidence. Appellee during the taking of evidence in rebuttal placed appellant, Catherine M. Hayes on the stand and she testified that the conveyance to her daughter took all of her property. A witness, Charles A. Davidson on the part of appellee testified that appellant, Catherine M. Hays, came to him to see about making a mortgage on this land. She called it a "blind mortgage" Quoting from his testimony, "They (referring to Mrs. Hayes and her daughter) came to our office and among other things, they were talking about this indebedness, that is in question here. It seems that Mrs. Hayes was on the note and the bank had taken out a judgment or was going to take a judgment, I am not sure which, and she wanted to know if it would have any--if it would be a lien on this land--that she had, or was going to deed to her daughter--and I am not sure whether she had deeded it to her daughter or not or whether she was going to, but she had conveyed it or intended to and she was talking about this judgment, whether or not it would be a lienon it . - - - She finally wanted to know if there couldn't be a 'blind mortgage' I believe that was

the term she used--a 'Blind Mortgage' made on it. And I believe I asked her what she meant by a 'Blind mortgage' and she referred to Mr. Stewart as having made a 'Blind mortgage' on his land, just simply to cover it up, I think I asked her and she said it was so it would protect or shield her daughter in the title to this land. - - - I said,"No" I said I wo'ldn't make you a mortgage knowing what I do about it."

It was first contended by appellant for a reversal of this judgment or decree that the judgment taken by confession against appellant was null and void for the reason that the note was described in the Declaration as being dated December 21, 1917, whereas the note attached to the declaration was dated Dec. 21, 1916. The judgment was taken on July 14, 1917. The note attached to the declaration showed on its face when it was dated and we are inclined to hold that said variance was not of a character that would render the judgment void. In fact it is the character of error that was waived in the cognovit. Carpenter v. First National Bank, 119 Ill. 352; Kris v. Bokmof, 46 Ill. App. 418; Humford v. Tolman, 54 Ill. App. 471.

It is also contended that said judgment is void for the reason that the confession was for $200. more than the amount of the principal and interest on the note. We do not think that this would render the judgment void. On motion it would have been corrected and a court of equity would have the right to disallow or abate said attorneys fees and hold the balance of the judgment good. Richaud v. Phillippi 128 Ill. App. 569; Campbell v. Goddard, 117 Ill. 291; Mitchell v. Supreme Lodge N.A.F.O. 155 Ill. App. 183.

Where the amount for an attorney fee is erroneously included in a judgment, the judgment will be upheld if a remittitur is entered for the amount of the attorney fee. Mooney v. Valentynowicz 141 Ill. App. 128. Upon a creditor's bill filed to obtain

satisfaction of a judgment after the return of an execution at law unsatisfied a court of chancery is not authorized to decide upon the regularity of the judgment and execution in the court of law, but in proper cause the proceedings upon the creditor's bill will be stayed a sufficient length of time to enable the defendant to apply to the law court for an order to set aside the judgment or execution for irregularities. Newman v. Willitts, 60 Ill. 518; Wichler v. Heft, 165 Ill. App. 166; Hultberg v. Anderson, 252 Ill. 607.

No motion was made by appellant in this case to have the judgment by confession opened and no steps were taken to stay this proceeding until the judgment could be corrected in the lower court so that we do not think the appellant is in a position to urge this assignment of error as the trial court deducted the amount of said attorney's fees of $200. from the amount of the decree rendered against appellant.

It is further contended by appellant that the evidence in the record fails to disclose that there was any actual fraud in the transfer made by Catherine E. Hayes to her daughter. The evidence in the record tending to show actual or intentional fraud on the part of appellant in making said transfer is the testimony of two witnesses who testified that Mrs. Hayes had said to them she had conveyed the property to her daughter in order to avoid liability for the indebtedness for which said judgment was confessed and the testimony of Charles A. Davidson who was an attorney at law, being the witness who testified that Mrs. Hayes wanted to know about the effect of making a "blind mortgage."

It is contended that the testimony of this witness was not competent for the reason he was an attorney at law and that Mrs. Hayes was there consulting him as such an attorney. On the other hand appellee contends that the relation of attorney and client was not established. We are of the opinion that mrs. Hayes was intending to consult Davidson as an attorney, notwithstanding no contract was entered into between them and no retainer fee was paid. The testimony of Davidson, however, tends

to show that Mrs. Hayes was seeking his, Davidson's advice with reference to a future act which in effect would be fraudulent in law, that is to say, she was consulting him with reference to the effect of giving a blind mortgage on her land or the land she had conveyed or intended to convey to her daughter for the purpose of avoiding the payment of the indebtedness for which this judgment was confessed. That being the state of the record the communication or conversation had between Mrs. Hayes and Mr. Davidson would not be privileged. 4 Wigmore on Evidence, Sec 2298. 23 American & English Ency. of law. Second Ed. page 76.

Wigmore in his exhaustive work on evidence says: "All reasons in favor of privilege cease to operate at a certain point,namely, where the desired advice refers not to prior wrong doing but to future wrong doing." This statement of the law was cited and approved in Lanum v. Patterson, 151 Ill. App. 36. We are inclined to hold the evidence of the witness Davidson competent.

It is next contended that the court erred in permitting appellee to place Mrs. Hayes on the stand in rebuttal and ask her with reference to whether all of the property she owned was at that time conveyed to her daughter. We think that was a discretionary matter with the court and at any rate there was no error as appellee asked leave to offer the evi evidence in chief so that appellants had an opportunity to treat the evidence as evidence in chief and offer other evidence in rebuttal to meet it if they had seen fit so to do.

It was also insisted that the bill did not charge that at the time of the making of said conveyance by Mrs. Hayes to her daughter that she was by such conveyance rendering herself insolvent and that therefore the bill was not sufficient on which to base a decree on the ground. We have examined the bill and are of the opinion that inasmuch as no objections were made to the evidence of Mrs. Hayes on that ground at the time it was offered, that the point cannot be made now.

In Dorn v, Wiswall, 180 Ill. the court at page 73 and 74 says: "Under our practice, if a party wishes to insist on a variance between

the allegation and the proof he must make the objection when the evidence is offered, and point out the variance specifically, so the opposite party may amend his pleading and thus obviate the difficulty."

We think that the evidence is sufficient to show that at the time of the conveyance by Mrs. Hayes to her daughter she rendered herself insolvent by such conveyance. We are also of the opinion that there was no sufficient evidence in the record as to an indebtedness owing by appellant to her daughter to support the conveyance as having been made for a valuable consideration.

It was also insisted that there was nothing to show that the other parties on the note were insolvent at the time the conveyance was made. The return on the execution which is not disputed is sufficient to show in effect that both of the other parties to said note had no property on which an execution could be levied.

It is also contended that the court was not in a position to render a decree in this case for the reason that Orlando Stewart and Hanna Stewart, the other parties to the judgment by confession, were not made parties defendant to this bill. This point is not well taken as it was not necessary that they should be made parties as no relief was sought against them and the record is to the effect they were insolvent.

The court further holds that the consent of Hirah, President of appellee Bank, to the conveyance of said property by Mrs. Hayes to her daughter even if sufficiently shown, would not estop said bank from pressing its suit.

Finding no reversible error in the record, the decree and judgment of the lower court will be affirmed.

Decree Affirmed.

/ Not to be reported in full.

Term No. 38. IN THE Agenda No. 45

APPELLATE COUTR OF ILLINOIS

FOURTH DISTRICT

October Term 1920.

William Blasdel, Defendant in Error. vs. Cache River drainage District, Plaintiff in Error.	Writ of Error To Circuit Court Pulaski County, I

Opinion by Boggs, J.

An action in assumsit was brought by William Blasdel, Defendant in error, hereafter called Plaintiff, against the Cache River Drainage District, plaintiff in error, hereafter called Defendant, in the Circuit Court of Pulaski County. The original declaration filed December 29, 1914 consisted of one special count and the common counts. Said special count alleged that said Drainage District was constructing a certain ditch within said district, extending over the lands of plaintiff and that it became necessary during the construction of said ditch to acquire certain lands of plaintiff along side and adjscent thereto: that said Drainage District through its duly authorized agents agreed and promised to pay plaintiff at the rate of $50. for each 2500 square feet of land so taken or used; that said district took and used 75.000 square feet and has failed and refused to pay for the same, alleging damages, etc.

On October 24, 1917. plaintiff filed an additional count

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

October Term 1920.

William Bland, Defendant in Error. vs. Cache River Drainage District, Plaintiff in Error.	Writ of Error To Circuit Court Pulaski County, I

Opinion by Dogge, J.

An action in assumpsit was brought by William Bland, Defendant in error, hereafter called Plaintiff, against the Cache River Drainage District, plaintiff in error, hereafter called Defendant, in the Circuit Court of Pulaski County. The original declaration filed December 29, 1914 consisted of one special count and the common counts. Said special count alleged that said Drainage District was constructing a certain ditch within said district, extending over the lands of plaintiff and that it became necessary during the construction of said ditch to acquire certain lands of plaintiff along side and adjacent thereto: that said Drainage District through its duly authorized agents agreed and promised to pay plaintiff at the rate of $50. for each 2500 square feet of land so taken and used; that said district took and used 75.000 square feet and has failed and refused to pay for the same, alleging damages, etc.

On October 24, 1917, plaintiff filed an additional count

alleging therein that it became necessary for said district in the construction of said ditch to damage certain lands of plaintiff adjacent to said ditch by throwing upon the same large quantities of earth and waste material; that the said drainage district through its duly authorized agent agreed and promised to pay plaintiff as liquidated damages for all land so damaged at the rate of $50. for each 2500 square feet of land so damaged; that there was damaged and used 75,000 square feet, etc. Defendant district filed a plea of the general issue; a plea of the Statute of Frauds and a plea setting up the five year Statute of Limitations.

A jury was waived by the parties and a trial was had by the court resulting in a finding in favor of plaintiff and judgment against defendant district for $1000. To reverse said judgment this writ of error is prosecuted. Defendant district, had laid out and was constructing a branch ditch known as Post Creek Cut Off. The work was commenced in 1912 and was finished in the late fall of 1913. Said ditch extended through the lands of plaintiff and his brother, Henry Bissel. Henry Bissel owning the land south of a certain public road crossed by said ditch, and plaintiff the land north of said road. Near where the ditch crossed said road was a cut about sixty feet deep. Said cut grew less in depth as it extended either north or south from said road. In laying out said work said district secured from plaintiff a right of way 300 feet wide under a written agreement. The original plans of defendant district contemplated that the dirt excavated from said ditch at this deep cut and for about 200 feet running north of said road into the lands of plaintiff should be hauled away and not be left on the banks of the ditch. In the construction of said ditch at this point the contractors were troubled by slides or the earth of the banks caving in; thereupon, a memorandum agreement was made with the contractors whereby defendant district permitted said contractors to deposit and leave the

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excavated earth on the banks of said ditch provided siad excavated earth must not be nearer than forty feet from the edge of said ditch. This arrangement required more land to be taken or used than was included in the original right -of -way through the lands of plaintiff and his brother. Plaintiff in error testified, and several other witnesses corroborated him to the effect that S.D. Peeler, chairman of the Board of Drainage Commissioners approached him while the work was in progress and siad it would be necessary to have more lands outside of the right-of-way upon which to deposit the earth and waste material from said ditch; that he did not know how much land would be required but that the drainage district would treat plaintiff right and asked him what damages he would want and plaintiff replied to make "him a proposition"; that Peeler then said the district would be willing to pay him at the rete the contractors paid his brother for additional lands taken, which was $50. for each 2500 square feet; that he, plaintiff replied, that would be satisfactory. The contractors proceeded with and finiehed their work, piling the waste earth upon the lands of plaintiff on a strip extending about I000 feet north of said road. Plaintiff wrote a letter to said commissioners demanding $I800. for his damages. Said commissioners testified that they had the ground outside of the right-of-way measured and that there was about I.65 acres and a drainage order for $165. was sent plaintiff to pay him at the rete of $I00. per acre for said land so used. Plaintiff refused to accept said check and returned it to the commissioners. Commissioner, S.D.Peeler, admits that he had a conversation with plaintiff while the work was in progress but denies that he promised plaintiff to pay him for the land so used. No records of said

excavated earth on the banks of said ditch provided said excavated earth must not be nearer than forty feet from the edge of said ditch. This arrangement required more land to be taken or used than was included in the original right-of-way through the lands of plaintiff and his brother. Plaintiff in error testified, and several other witnesses corroborated him to the effect that S.D. Feeler, chairman of the board of Drainage Commissioners approached him while the work was in progress and said it would be necessary to have more lands outside of the right-of-way upon which to deposit the earth and waste material from said ditch; that he did not know how much land would be required but that the drainage district would treat plaintiff right and salve him what damages he would want and plaintiff replied to make "him a proposition"; that Feeler then said the district would be willing to pay him at the rate the commissioners paid his brother for additional lands taken, which was $80. for each 2500 square feet; that he, plaintiff replied, that would be satisfactory. The contractors proceeded with and finished their work, piling the waste earth upon the lands of plaintiff on a strip extending about 1000 feet north of said road. Plaintiff wrote a letter to said commissioners demanding $1800. for his damages. Said commissioners testified that they had the ground outside of the right-of-way measured and that there was about 1.65 acres and a drainage order for $165. was sent plaintiff to pay him at the rate of $100. per acre for said land so used. Plaintiff refused to accept said check and returned it to the commissioners. Commissioner, S.D.Feeler, admits that he had a conversation with plaintiff while the work was in progress but denies that he promised plaintiff to pay him for the land so used. No records of said

drainage district were produced on the trial. All of the Commissioners testified that there was no record showing an agreement to pay damages to plaintiff for said additional land; that said matter never was considered by said Board until they received plaintiff's letter. After the beginning of this suit but before judgment was rendered plaintiff sold said lands and deeded them away. No propositions of law were submitted, on the hearing.

It is first contended by defendant district that the statute of limitations bars plaintiff from a recovery in this case on the additional count for the reason that said declaration is founded on a contract made between plaintiff and said drainage district executed September I5th, I9I2, while the additional count was not filed until October I9I7. more than five years after the date of said contract. The statute of limitations would not begin to run until plaintiff would be entitled to bring his suit. The undisputed fact in the case disclose that the work was not completed until the latter part of I9I3. The declaration alleges that defendant district agreed to pay plaintiff for whatever lands were damaged. This could not be determined until the work was completed. Therefore, the statute of limitations was not a bar to a recovery if otherwise plaintiff was able to maintain his suit. O'Brien v. Sexton I40 Ill. 5I7-523.

It is next contended by counsel for defendant district that the evidence fails to show that any contract was made and entered into between plaintiff and defendant district either verbal or written. An examination of the record satisfies us that this assignment of error is well taken. The evidence in the record wholly fails to show any action taken by the commissioners of defendant drainage district looking to the making of a contract by said district with plaintiff for the taking or damaging of the additional lands claimed by plaintiff to have been damaged. As

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we understand ~~that~~ plaintiff does not contend that there is any such record. The contention of plaintiff being that at or about the time the work on the construction of said ditch was in operation at or near his lands, he had a conversation with S.D.Peeler, one of the commissioners, and that Peeler told him in effect the district would need additional land from him on which to throw the dirt excavated from said cut-off ditch and that the drainage district would pay him at the same rate the contractors had agreed to pay the brother of plaintiff, One or two witnesses corroborated plaintiff with reference to this conversation. Peeler denied having had such conversation and all of the commissioners testified that there was no record made by their board looking to a contract with plaintiff for the taking of these additional lands and that there was no ratification of any contract made by Peeler or anyone els with plaintiff for the taking or using of his lands for the purpose of throwing excavated dirt thereon.

It is a well established principle of law that corporations, such as a drainage district, can only be bound in contracts where the commissioners act as a body corporate and where their acts are authenticated by their records. McHaney v. County of Marion, 77 Ill. 488; People v. Madison Co., 125 Ill. 334; O'Connor v. Chicago Terminal R.R,Co.,184 Ill.308-321;Marsh v. People 226 Ill. 464-470; People v. Schenck 252 Ill. 441.

In the case of People v. Schenck, supra, the court at page 441 says: "A record of the proceedings of drainage commissioners is required to be kept, and such record is the only legal evidence of their action."

The evidence therefore wholly fails to support the allegations of the special count in plaintiff's original declaration and in the

we understand that plaintiff does not contend that there is any such record. The contention of plaintiff being that at or about the time the work on the construction of said ditch was in operation at or near his lands, he had a conversation with S.D.Peeler, one of the commissioners, and that Peeler told him in effect the district would need additional land from him on which to throw the dirt excavated from said cut-off ditch and that the drainage district would pay him at the same rate the contractors had agreed to pay the brother of plaintiff. One or two witnesses corroborated plaintiff with reference to this conversation. Peeler denied having had such conversation and all of the commissioners testified that there was no record made by their board looking to a contract with plaintiff for the taking of these additional lands and that there was no ratification of any contract made by Peeler or anyone else with plaintiff for the taking or using of his lands for the purpose of throwing excavated dirt thereon.

It is a well established principle of law that corporations, such as a drainage district, can only be bound in contracts where the commissioners act as a body corporate and where their acts are authenticated by their records. McHaney v. County of Marion, 77 Ill. 488; People v. Madison Co.,125 Ill. 334; O'Connor v. Chicago Terminal R.R.Co.,184 Ill.508-521;Marsh v. People 226 Ill. 444-450; People v. Schenck 252 Ill. 441.

In the case of People v. Schenck, supra, the court at page 441 says: "A record of the proceedings of drainage commissioners is required to be kept, and such record is the only legal evidence of their action."

The evidence therefore wholly fails to support the allegations of the special count in plaintiff's original declaration and in the

additional count filed in said cause, both of which allege as the bases of the right of recovery a contract made and entered into between plaintiff and said drainage district. The common counts filed with the original declaration are the ordinary common counts and are not sufficient on which to base a right of recovery on the evidence that was offered in this cause. The only evidence offered by plaintiff was on the alleged contract set forth in the additional count and as stated above not being properly proven would not be sufficient, Said evidence being as to the amount plaintiff claimed Peeler agreed said drainage district should pay and the evidence as to how much land was used. There is no evidence with reference to what the actual damages suffered by plaintiff were.

It is next contended by defendant district that the statute of frauds being pleaded there could be no right of recovery under the declaration in this case for the reason that the contract sued on was not evidenced in writing. In view of our holding that there was no contract, either express or implied entered into between plaintiff and said drainage district, it is not necessary for us to discuss this assignment of error, for there would be nothing on which this plea could operate.

It is further contended by defendant drainage district that the contractors, Moffett and herrick who were employed by said drainage district to conatruct said ditch, were independant contractors and as such were responsible for any damage that might occur to plaintiff's lands by reason of the doing of said work and that said district could in no way be held liable. We do not think this point well taken. The record tends to show that the caving in of said banks, etc., was on account of the original plans adopted by said district not allowing aufficient slope for that character of soil. On this theory of the case defendant

additional count filed in said case, both of which allege as the basis of the right of recovery a contract made and entered into between plaintiff and said drainage district. The common counts filed with the original declaration are the ordinary common counts and are not sufficient on which to base a right of recovery on the evidence that was offered in this cause. The only evidence offered by plaintiff was on the alleged contract set forth in the additional count and as stated above not being properly proven would not be sufficient. Said evidence being as to the amount plaintiff claimed peeler agreed said drainage district should pay and the evidence as to how much land was used. There is no evidence with reference to what the actual damages suffered by plaintiff were.

It is next contended by defendant district that the statute of frauds being pleaded there could be no right of recovery under the declaration in this case for the reason that the contract was not evidenced in writing. In view of our holding that there was no contract, either express or implied entered into between plaintiff and said drainage district, it is not necessary for us to discuss this assignment of error, for there would be nothing on which this plea could operate.

It is further contended by defendant drainage district that the contractors, Moffett and Herrick who were employed by said drainage district to construct said ditch, were independent contractors and as such were responsible for any damage that might occur to plaintiff's lands by reason of the doing of said work and that said district could in no way be held liable. We do not think this point well taken. The record tends to show that the caving in of said banks, etc., was on account of the original plans adopted by said district not allowing sufficient slope for that character of soil. On this theory of the case defendant

district could not extape liability on the ground that the damages were occasioned by independent contractors. Nicholson v. Inlet Swamp drainage district 280 Ill. 366.Wineman v. DePalma. 58 U.S.(Law Edition) 733.

Other errors were assignsd on the record but in our view of the case as above set forth it is not necessary for us to go into a discussion of the same. There being no contract, either express or implied, shown by the evidence in the record on which plaintiff could base his right of action, it would seem that his case, if he have one, would be an action on the case or in trespass.

For the reasons above set forth the judgment of the trial court will be reversed and the cause willbe remanded.

Reversed and remanded.

Not to be reported in full.

district court not errors. Liability on the ground that the damages were occasioned by independent contractors. Nicholson v. Lake Swamp drainage district 260 Ill. 306. Kennedy v. Dwelling, 2d L.R.(Law Edition) 723.

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For the reasons above set forth the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Not to be reported in full.

Term No. 44.

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM A. D. 1920.

Agenda No. 24.

222 I.A. 657

Vesta Benton, Appellee. vs. Charles F. Dew, Administrator of the Estate of Martha Evans, deceased, Appellant.	Appeal from Circuit Court Marion County.

Opinion by Boggs, J.

Appellee filed a claim for $2100. in the County Court of Marion County against the estate of Martha Evans, her deceased mother, for services rendered by her during her mother's last illness. A trial was had in the County Court resulting in judgment in favor of appellee for $2100. On appeal to the Circuit Court a trial was had and verdict was rendered in favor of appellee for $1800. A motion for a new trial made by appellant, was overruled by the Court and judgment was rendered on the verdict. To reverse said judgment this appeal is prosecuted.

The record discloses that Martha Evans died interstate on or about July 16th, 1919. At the time of her death she was living in Centralia, Illinois with her husband, Horace Evans. Mrs. Evans had been married three times. Appellee was a daughter of her second husband. In 1917 Mrs. Evans was suffering from a serious illness pronounced by some of the doctors as cancer of the stomach. In October 1917, appellee who was then living in Los Angeles,

Handed down July 8th 1921 No rehearing asked.

IN THE

APPELLATE COURT OF INDIANA

FOURTH DISTRICT

OCTOBER TERM A. D. 1920.

Vesta Benton, Appellee. vs. Charles I. Tom, Administrator of the Estate of Martha Byrne, deceased, Appellant.	Appeal from Circuit Court Marion County.

Opinion by Boggs, J.

Appellee filed a claim for $2100. in the County Court of Marion County against the estate of Martha Byrne, her deceased mother, for services rendered by her during her mother's last illness. A trial was had in the County Court resulting in judgment in favor of appellee for $2100. On appeal to the Circuit Court a trial was had and verdict was [illegible] for appellee for $1200. A motion for a new trial [illegible] overruled, and [illegible] rendered on the verdict. To reverse said judgment this appeal is prosecuted.

The record discloses that Martha Byrne died intestate on or about July 16th, 1919. At the time of her death she was living in Centralia, Illinois with her husband, Horace Byrne. Mrs. Byrne had been married three times. Appellee was a daughter of her second husband. In 1917 Mrs. Byrne was suffering from a serious illness pronounced by some of the doctors as cancer of the stomach.

California, came to Centralia and lived in the home of her mother and took care of her for some nine months. Appellee then returned to Los Angeles. After appellee returned to California her mother's condition grew wors and the help they were able to obtain was not satisfactory. In February 1919 Mrs. Evans' husband wrote appellee informing her of her mother's condition. Appellee again left her home and came and took care of her mother until sometime in May 1919, when she again returned to California. As stated above Mrs. Evans died in July 1919 and appellant, Charles F. Dew was appointed administrator of the estate and duly qualified as such.

It is contended on the part of appellant for a reversal in this cause that the verdict and judgment is against the manifest weight of the evidence. In support of this assignment of error appellant contends that when appellee came to her mother's home she did so on a visit and that the relation in the home between Mrs. Evans and appellee was that of parent and child; that there was no intention on the part of appellee to receive pay for any services she might render and that such services in law were gratituous and that no right of recovery could be had therefor. On the other hand, appellee contends that she was there taking care of her mother at her mother's request and that she expected pay and that her mother expected to pay her for the services rendered.

Appellee offered in evidence, and the court admitted, the following document signed by Mrs. Evans:

"Centralia, Ill., Dec., 6, 1918.

"It is my wish and I hereby direct that the administrator or executor of my estate shall pay to my daughter, Vesta Smith Benton, the sum of Five Dollars ($5.00) per day for taking care of me during my illness from February 29th, 1918, so long as she shall stay and take care of me.

Martha Evans."

California, [illegible]

and took care of her for some nine months. Appellee then returned to Los Angeles. After appellee returned to California her mother's condition grew worse and the help they were able to obtain was not satisfactory. In February 1919 Mrs. Evans' husband wrote appellee informing her of her mother's condition. Appellee again left her home and came and took care of her mother until sometime in May 1919, when she again returned to California. As stated above Mrs. Evans died in July 1919 and appellant, Charles T. Dow was appointed administrator of the estate and duly qualified as such.

It is contended on the part of appellant for a reversal in this case that the finding and judgment [illegible] weight of the evidence. In support of this assignment of error appellant contends that when appellee came to her mother's home [illegible] on a visit and that the relation in the home between Mrs. Evans and appellee was that of parent and child; that there was no intention on the part of appellee to receive pay for any services she might render and that such services in law were gratituous and that no right of recovery could be had therefor. On the other hand, appellee contends that she was there taking care of her mother [illegible]

Appellee offered in evidence, and the court admitted, the following document signed by Mrs. Evans:

"Centralia, Ill., Dec., 6, 1918.

"It is my wish and I hereby direct that the administrator or executor of my estate shall pay to my daughter, Vesta Smith Benton, the sum of Five Dollars ($5.00) per day for taking care of me during my illness from February 20th, 1918, so long as she shall [illegible] take care of me.

[illegible]

This document was witnessed by Minnie March and M. Sperling. In addition thereto several witnesses testified on behalf of appellee in effect that they had heard Mrs. Evans state that she wanted Vesta to be paid for coming from Los Angeles and taking care of her. These same witnesses testified they saw appellee in the home doing general housework, giving medicane to her mother, bathing her and otherwise taking care of her. On the other hand several witnesses on the part of appellant testified that while appellee was there for some eleven or twelve months in all, she was not attentive to her mother; that she was out frequently at night and that the greater part of the work around the house was done by the husband of Mrs. Evans and that Mrs Evans had complained to them of inattention on the part of appellee.
While the evidence is conflicting, we are of the opinion that the verdict of the jury is supported by the evidence.
It is further contended by appellant that there was no proper proof of the value of the services rendered by appellee. Several witnesses testified on the part of appellee that services of the character rendered by appellee were worth from Five to Ten dollars per day. Taking the time, it is conceeded by all of the witnesses that appellee was in the house of her mother, the judgment recovered would not amount to more than Four dollars per day. We therefore hold that the verdict so far as the amount is concerned is supported by the weight of the evidence.

It is next contended by appellant that the Court erred in admitting in evidence the statement signed by Mrs. Evans. It is not contended by council for appellee that this statement amounted to a Will, neither is it contended that it was binding as to the amount appellee was entitled to recover for services rendered prior to the execution of the same. We think ,however, that the Court ruled properly in admitting this document, at least for the purpose of

This document was witnessed by [illegible]

care of her. These same witnesses testified they saw appellee in the home doing general housework, giving medicine to her mother, [illegible]

several witnesses on the part of appellant testified that while appellee was there for some eleven or twelve months in all, she was not [illegible] to her mother; that she was out frequently at night [illegible] greater part of the work around the house was done by [illegible] of the. Evans and that the Evans had complained to them of it [illegible].

While the evidence is conflicting, we are of the opinion that the verdict of the jury is supported by the evidence.

[illegible] of the value of the services rendered by appellee. Several [illegible] testified [illegible] that [illegible] rendered by appellee were worth from Five to Ten dollars per day. [illegible] time, it is conceded by all of the witnesses that appellee was in the home of her mother, the judgment recovered would [illegible] the amount is concerned is supported [illegible] of the evidence.

It is [illegible] by appellant that the Court erred [illegible] appellee was entitled to recover [illegible] Bill, notice is illustrated from [illegible] appellee was entitled to recover for services [illegible] operation of the [illegible] Act [illegible]

showing that appellee was not intending to render her service gratuitously and Mrs. Evans, her mother, expected to pay her therefor.

It is next contended by appellant that even the said statement should otherwise be given some effect by the Court and the jury, that the evidence in the record shows that Mrs. Evans at the time she executed said instrument was not of sound mind and was not at that time able to transact ordinary business. Various witnesses testified on the part of appellant to the effect that they did not believe Mrs. Evans at the time of signing said instrument was of sound mind and able to transact ordinary business. On the other hand various witnesses of apparent equal credibility testified on behalf of appellee that in their judgment Mrs. Evans was of sound mind and able to transact business. While the evidence is conflicting on this issue, we think the jury were warrented in finding that Mrs. Evans at the time in question was of sound mind.

It is next contended by appellant that the Court erred in giving instructions one, two, three and five given on the part of appellee. It is contended that the first instruction directed a verdict and that it does not contain all the elements necessary in an instruction of this kind. We have examined this instruction and as we view it, it does not direct a verdict and while not as artistically drawn as it might be, it in effect states a correct principle of law applicable to the facts in the case. There was no error in giving said instruction.

It is contended by appellant that instruction No. two is founded on the statement signed by Mrs. Evans and that this state-
~~been given. We find no instruction and therefore should not have~~
ment does not amount to a contract and therefore should not have been given. While this instruction is not strictly accurate as applied to the facts in this case, still as the proof shows that

showing that appellee was not intending to render her service gratuitously and Mrs. Evans, her mother, expected to pay her therefor.

It is next contended by appellant that even the said statement should otherwise be given some effect by the Court and the jury, that the evidence in the record shows that Mrs. Evans at the time she executed said instrument was not of sound mind and was not at that time able to transact ordinary business. Various witnesses testified on the part of appellant to the effect that they did not believe Mrs. Evans at the time of signing said instrument was of sound mind and able to transact ordinary business. On the other hand various witnesses of appellee equal credibility testified on behalf of appellee that in their judgment Mrs. Evans was of sound mind and able to transact business. While the evidence is conflicting on this issue, we think the jury were warranted in finding that Mrs. Evans at the time in question was of sound mind.

It is next contended by appellant that the Court erred in giving instructions one, two, three and five given on the part of appellee. It is contended that the first instruction directed a verdict and that it does not contain all the elements necessary in an instruction of this kind. We have examined this instruction and as we view it, it does not direct a verdict and while not as artistically drawn as it might be, it in effect states a correct principle of law applicable to the facts in the case. There was no error in giving said instruction.

It is contended by appellant that instruction No. two is founded on the statement signed by Mrs. Evans and that this statement does not amount to a contract and therefore should not have been given. While this instruction is not strictly accurate as applied to the facts in this case, still as the proof shows that

Jury did not allow damages according to the terms of said statement, we are of the opinion that no substancial damages resulted to appellee by the giving of same.

The third instruction complained of informs the jury that they have nothing to do with the matter as to the amount of the estate left by Mrs. Evans. We think this instruction stated a correct principle of law and the Court did not err in giving it.

In instruction No. five the Court informed the jury that they had a right to take into consideration the value of the services rendered by appellee as shown by the evidence. It is contended by appellant this instruction is wrong, and that there can be no recovery without a contract, The objection to this instruction is not well taken. It is not necessary to show an express contract in this character of case. An implied contract is sufficient on which to base a right of recovery and such contract may be shown by facts and circumstances. The value of the services may be shown by the evidence of competent witnesses and it is not necessary that the amount to be paid therefor be fixed by contract. Sweitzer vs. Koe— 146 Ill. 577; Neish vs. Gannon, 198 Ill. 219; Miller vs. Miller 16 Ill. 295; Heffron vs. Whiteside 190 Ill. 576; Keyes vs. Estate of Thornton, 150 Ill. App. 523; Bradenkamp vs. Rouge, 143 Ill. App.492.

It is also contended by appellant that the Court erred in refusing to admit the inventory of Mrs. Evans' estate in evidence. In our judgment there was no error committed by the Court in this ruling, especially in view of the fact that the Court allowed witnesses on the part of appellant to testify as to the value of said estate.

Finding no reversible error in the record the judgment of the trial Court will be affirmed.

Judgment Affirmed.

Not to be reported in full.

Jury did not allow damages according to the terms of said estate-ment, we are of the opinion that no substantial damages resulted to appellee by the giving of same.

The third instruction complained of informs the jury that they have nothing to do with the matter as to the amount of the es-tate left by Mrs. Evans. We think this instruction stated a correct principle of law and the Court did not err in giving it.

In instruction No. five the Court informed the jury that they had a right to take into consideration the value of the ser-vices rendered by appellee as shown by the evidence. It is contended by appellant this instruction is wrong, and that there can be no re-covery without a contract. The objection to this instruction is not well taken. It is not necessary to show an express contract in this character of case. An implied contract is sufficient on which to base a right of recovery and such contract may be shown by facts and circumstances. The value of the services may be shown by the evidence of competent witnesses and it is not necessary that the amount to be paid therefor be fixed by contract. Swisher vs. Xoa 146 Ill. 577; Metah vs. Gannon, 198 Ill. 219; Miller vs. Miller 16 Ill. 295; Heffron vs. Whiteside 190 Ill. 576; Keyes vs. Estate of Thornton, 150 Ill. App. 525; Bradenkamp vs. Rouge, 143 Ill. App.492.

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Finding no reversible error in the record the judgment of the trial Court will be affirmed.

Judgment Affirmed.

Not to be reported in full.

Term No. [illegible]

In the
[illegible]
Fourth District
October Term A. D. [illegible]

222 I.A. 658

T. C. [illegible],
Appellee,

vs.

[illegible],
Appellant.

Appeal from
[illegible]
[illegible]

The Court.

In this case Appellee has entered a motion to dismiss the appeal for the reason that there is no final order or judgment shown in the record from which an appeal may be taken, or from which error can be assigned. The stipulation of counsel, however, filed by appellant in lieu of this Court, which clearly the opinion of the judge of the Circuit Court was filed [illegible]. The particular portion of the minutes, upon which appellant relies as constituting a judgment, is as follows:

> Motion to [illegible] filed, motion overruled, judgment entered and order on appeal in the [illegible] Court of the 4th District of Ill. [illegible] [illegible] in [illegible] appeal bond in [illegible], [illegible] of this Court seem to be approved by the [illegible] bond [illegible] filed within [illegible] days. [illegible] Nov. 15, 1920.

This minute or memorandum, made by the Judge in the order

handed down
July 8th 1921
no re-hearing asked

of the trial, is not in itself a judgment, upon which is based an writ of error may be based. In a similar case the Appellate Court of the first dist. said, "This is not a judgment. It is a mere memorandum, [illegible] in the [illegible] proceeding; in his [illegible] [illegible]." This holding follows the rule of the Supreme Court, held here in [illegible] v. [illegible], 111 Ill. 87; Martin v. Dunlevy, 90 A. S. 5; Lewis Blunt Keller, [illegible] Co. v. Leonard 152, 25 [illegible].

Accordingly the motion of appellee will be overruled and the [illegible].

Not to be reported in full.

Term No. 3. Agenda No. 1

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term, A. D. 1921.

CLARA B. SMITH, Appellant, vs. WILLIAM W. WHEELOCK, Receiver, Illinois Southern Railway Company, Appellee.	Appeal from RANDOLPH.

Opinion by Higbee, P. J.

Appellant brought this suit to recover damages for personal injuries sustained when her husband's automobile, in which she was riding was struck by appellee's train at the railroad crossing at Walsh in Randolph county, on June 7, 1919.

Appellant's husband, L. J. Smith was driving the automobile at the time of the accident. The facts involved in this case are the same as the facts in the case of L. J. Smith, v. Wheelock, Receiver in which an opinion was filed by this court, October 28, 1920, being a suit by the husband to recover damages for injuries received in the same accident. Since, under the view we take of this case, the judgment must be reversed and the cause remanded on account of errors committed in the giving of instructions, we will not discuss the weight of the evidence, except to say, the evidence was in certain respects conflicting and the jury should therefore, have been fully and accurately instructed.

It is claimed by appellant the court erred in giving appellee's instruction No. 1. That instruction is as follows: "The jury are instructed that the defendant's servants in charge of the locomotive engine which struck the automobile in which the plaintiff was riding had the right to assume that the plaintiff would exercise care and caution to keep herself out of danger until they saw something in her conduct which was inconsistent with such assumption. If the plaintiff was riding in an automobile upon the public highway approaching the railroad track and so far removed therefrom as to be free from danger of collision, they had the right to assume that she would remain at a safe distace, until she manifested a purpose to place herself in dangerous proximity to it." It is true that this instruction is practically the same as one approved by the Supreme Court in C. R. I. & P. R. R. Co. v. Austin, 69 Ill. 426. That Court however in the later case of L. N. A. & C. Ry. Co. v. Patchen, 167 Ill. 204, in considering the action of the trial court in refusing a very simillar instruction said: "An instruction somewhat similar was held to be a correct statement of the law in Chicago, Rock Island & Pacific Railroad Co. v. Austin, 69 Ill. 426, but in later cases the tendency

of the decisions has been to the effect that the matters and things stated in the instruction which the servants of the railroad company might, as a matter of law, assume, were questions of fact for the determination of the jury. The question was one purely of fact, and whether the servants of the railroad company in charge of the train might assume one thing or another was a question for the jury to determine from all the evidence and not a question of law and had the instruction submitted the question as one of fact it might be sustained, but as the instruction directed the jury, as a question of law, that the servants of the railroad in charge of the train might assume certain things therein specified, it was erroneous." It is worthy of consideration that in the Austin case referred to in the above quotation the party injured appears to have been walking on a line parallel with the railroad track just prior to the injury while in this case appellant approached the track at right angles which if pursued would carry her directly on the track. The Supreme Court also held in I. C. R. R. Co. v. Slater, 139 Ill. 190, that it was not error to refuse a somewhat similar instruction. We are of the opinion that this instruction is subject to the same criticism made of the one referred to in L. N. A. and C. Ry. Co. vs. Patchen, supra, nad that it was error to give it.

Appellant's contention that appellee's instruction No. 4 was erroneous presents a difficult question. It said, "The jury are instructed that positive evidence as to a fact, as that a bell was rung or a whistle sounded, or any other fact not improbable in itself, is entitled to more weight than negative evidence in relation to such facts." This instruction states an abstract proposition of law and to sustain the contention that it is good appellee cites, Chicago & Alton R. R. Co. v. Gretzner, 46 Ill. 74; Hank v. Peoria Ry. Co. 154 Ill. App. 473; Atchinson T. & S. F. R. R. v. Feehan, 149 Ill. 202. It is to be noted that whilel the court in the first two of these cases does lay down the rule as stated in the instruction, yet in those cases the court was not considering an instruction, but in both cases was considering the sufficiency of the evidence and stated the rule as one by which the court was governed. In the last case cited by appellee the court after recognizing the rule, held it was not error to refuse the instruction and said "We are not disposed to hold that it would have been error if the court had given to the jury an instruction applying that rule to the testimony before them". In that case the rule is not stated in terms so general as in the instruction in the instant case, where the abstract rule is stated in the most general language, without any attempt to apply it to the evidence before the jury. On the other hand the Supreme Court in the case of Rockford v. Poundstone, 38 Ill. 199, in considering an instruction advising the jury that the testimony of a witness that he saw a certain object should be regarded as stronger proof than the testimony of a witness who swore he did not see it, said, "We do not understand it is the province of the court to tell the jury in a case where there is much and conflicting testimony, or indeed in any case, which evidence is the strongest. It is not true that affirmative testimony is to be preferred before negative testimony, so called, under all circumstances, and that is the purport of this instruction, and was calculated to bias the mind of the jury very much. The value of all testimony is to be ascertained by the jury by weighing it, and to find which-

ever way it may prepondrate. This instruction should not have been given." Again the Supreme Court held that an instruction stating this rule in language not so general as we find it here, "was wrong and properly refused." (L. N. A. & C. Ry. Co. v. Shires, 108 Ill. 167) In that case the court said, "It is the peculiar province of the jury where the evidence is conflicting to properly weigh all the evidence, and determine for themselves what the weight of the evidence may be. We do not understand that it was the province of the court to tell the jury which evidence was the strongest, or which is of greater force." Such also was the holding of the court in T. W. & W. Ry. Co. v. Brooks, 81 Ill. 245; C. & N. W. Ry. Co. v. Trayes, 33 Ill. App. 307. In holding that it was not error to refuse a similar instruction the Supreme Court said, "In any event an instruction which attempts to advise the jury, that in determining whether a bell did ring the testimony of a witness who testifies affirmatively that a bell was rung is of greater weight than that of a witness who testifies that he did not hear it ring, should be based on the hypothesis of equal opportunity. The instructions now before us are defective in this respect." (I. I. & I. R. R. Co. v. Otstot, 212 Ill. 229). The instruction now before this court is defective in the same respect. It will be seen that it has been uniformly held not to be error to refuse an instruction, stating the rule in even less general language than is here used. No attempt is made to apply the rule to the evidence, nor it it based "on the hypothesis of equal opportunity" of the witnesses and the most general language is used, without any effort to explain what is meant by "positive" and "negative" evidence. While we would hesitate to hold that the giving of this instruction standing alone in itself, under all circumstances would constitute reversible error, yet we are of the opinion under the conditions existing in this case, it was error for the court to give it.

It is contended the trial court also erred in giving appellee's 6th and 7th instructions. By the 6th instruction the jury are told it was not the duty of the engineer to stop the train to avoid a collision with the automobile, but that is was the duty of the person in charge of the automobile to stop "provided, by the use of ordinary care, plaintiff could have known of the approaching train." The seventh instruction is the usual instruction on the plaintiff's duty in such cases "to stop, look and listen". Both of these instructions would be good if appellant had been in charge of the automobile but she was not as it was being driven by her husband and the instructions were therefore not applicable to the facts in the case. Complaint is also made of appellee's given instructions Nos. 2, 5, and 8 but upon examination we do not find any of them materially erroneous.

It is further urged by appellant that the court erred in refusing to admit in evidence its plat of the crossing and surroundings. This action of the court was not error, as the evidence seems to show it was inaccurate in some respects and was not drawn to the proper scale. Neither do we think it was error for the court to admit in evidence on behalf of appellee the photographs of the crossing and surroundings taken the day following the accident.

For the errors in instructions above pointed out the judgment is reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

Term No. 5. Agenda No. 4.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

March Term, A. D. 1921.

LUCY BREWINGTON,
Appellee.
vs.
SOUTHERN ILLINOIS RAILWAY & POWER COMPANY, a Corporation,
Appellant.

Appeal from Saline.

Opinion by HIGBEE, P. J.

This is a suit brought by appellee to recover damages for injuries alleged to have been received when alighting from one of appellant's cars on June 20, 1917, at Thompson's Crossing in Carrier Mills, Saline county. On trial before a jury a verdict was returned in favor of appellee for $400. From the judgment rendered on that verdict this appeal has been taken.

The evidence clearly shows appellee suffered a fractured wrist on that date. Appellee testified positively that appellant's car was started just as she was alighting and threw her to the ground, breaking her wrist. Upon the trial it was admitted by appellant that one Len Portee, an absent witness, would if present, swear that after the car stopped for the crossing and while appellee was on the steps making preparations to alight, the motorman in charge of thecar started the same with a sudden jerk, causing appellee to fall and that thereby her arm was broken. This statement fully corroborated appellee's testimony as to the manner in which she was injured. No witness denied she was so injured. One witness testified that he was a conductor for appellant in June, 1917, and was on the run on which appellee claimed to have been injured, unless he was on some other job, and that he did not know of anyone being injured at Thompson's Crossing. Appellee testified she called for a ticket from Harrisburg to Thompson's Crossing, which was a flag stop, and told the conductor she wanted off at that crossing. Apellant's proof was to the effect that no tickets were ever sold to Thompson's Crossing, but that cars did stop there to take on and discharge passengers. The proof fully shows that appellee called for a ticket to Thompson's Crossing at the office of appellant in Harrisburg and that a ticket to some point on appellant's road was given her; that she told the conductor she wanted to get off at Thompson's Crossing! that the car stopped at said crossing and that appellee was injured while attempting to alight at that place by the sudden starting of the car. Under this state of the proof the jury were fully warranted in finding for appellee. Appellant insists that the court erred in giving appellee's instructions Nos. 2, 4 and 5. The criticism

made of those instructions is that they contained the expression, "If you believe from the evidence," instead of "If you believe from a preponderance of the evidence." Appellant's instructions Nos. 2 and 3, however, clearly instructed the jury that their belief must be founded upon the preponderance of the evidence. It has been frequently held that an instruction such as those here complained of even though omitting all reference to the evidence, was not erroneous, where in other instructions, it clearly appeared that the jury had been instructed that their belief must be founded upon the preponderance of the evidence. (Coulter v. I. C. R. R. Co., 264 Ill. 414, and cases there cited.

Complaint is also made of appellee's instructions Nos. 2 and 5 because they limit her exercise of due care and caution for her own safety to the time of the injury and do not require the exercise of such care and caution by her at and "immediately prior" to the injury. These instructions are subject to the criticism made, but the appellant is in no position to raise that objection, as it gave an instruction expressly stating that appellee must "prove by a preponderance of the evidence that at the time of the injury in question she was herself in the exercise of reasonable care and caution for her own safety." It is a well recognized rule that a party cannot complain of an error in instructions, when the same error is found in the instructions offered by the complaining party. (McInturff v. Ins. Co. of North America, 248 Ill. 92. The judgment of the court below is affirmed.

Affirmed.

Not to be reported in full.

Term No. 24 Agenda No. 15

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term A. D. 1921.

ORVAL D. DIXON,
Appellee.

vs.

EAST ST. LOUIS & SUBURBAN RAILWAY COMPANY,
Appellant.

Appeal from Madison.

Opinion by Higbee, P. J.

This is an appeal from a judgment of the circuit court of Madison county, in favor of appellee in the sum of $5000.00 as damages for personal injuries sustained by him in a head on collision between an electric car in which he was a passenger, owned and operated by appellant and a locomotive with coal train attached also owned and operated by appellant, on May 28, 1920.

It is admitted by appellant that appellee's injuries were caused by the negligence of appellant's servants and that appellee is entitled to recover on this case, its only contention being that the damages awarded are excessive. The accident occurred on May 28, 1920. Appellee was in the hospital until June 6, when he was removed to his home, and after that time was still attended by a physician. He was working as a driver in a coal mine prior to the accident, receiving $6.75 per day wages, but shortly after the accident the wages of such drivers were increased to $8.25 per day. Appellee did not return to work until September 3. When he returned to the mine, he was put to work as a laborer, cleaning the road, but after two days being psysically unable to do that work, he was put to work as a trapper at $4.00 per day wages. He testified that as a result of the accident, he is unable to do heavy work, still suffers pains in his side and back, does not sleep well, had lost 15 pounds in weight, his eyes bother him and that he has headaches. He is corroborated in this to some extent by Dr. Haven who attended him after he was removed from the hospital to his home. He was rendered unconscious by the collision and complained of severe pains at that time. The surgeon of the railway company and two other physicians who examined him at the time of the accident or while he was in the hospital and who were witnesses for appellant, were of the opinion he was not injured to any great extent.

Appellant calls attention to a number of cases where judgments of the size of this one or even smaller, have been held excessive, but the amount of damages which may be recovered of course depends on the circumstances of the case and cannot be a matter of exact mathematical computation. DeFillippi vs. Spring Valley Coal Co., 202 Ill. App. 61. In approaching this

question also it is wise to have in mind the language of the Appellate Court in the case of DeLohery vs. Quinlan, 210 Ill. App. 321 where it is said concerning damages in a personal injury case "on the question of the amount of the verdict the earlier decisions of this state are of little assistance. We cannot be unmindful of the fact that money value of life and health is appreciating and the purchasing power of money steadily depreciating during the recent years." The question of damages and the amount to be recovered must necessarily be largely left to the jury which tries the case and unless they are so excessive and so manifestly against the weight of the evidence as to indicate that the jury have been governed by prejudice or passion in rendering the verdict, a reviewing court having before it only the record of the trial is not warranted in setting the verdict aside on the ground it is excessive. Unterbrink vs. City of Alton, 206 Ill. App. 253; Sprengle vs. Schroeder, 203 id. 213; Lincoln vs. Prior 199 id. 228; Thomas vs. Ohio Coal Co., 199 id. 50. The record in this case discloses nothing which would indicate passion or prejudice on the part of the jury trying the case and the damages under all the circumstances are not sufficiently large to alone warrant us in holding that the jury was so influenced in finding their verdict. Appellee had a clear and uncontested right to recover a verdict in his favor, the case was fairly submitted to the jury and no sufficient reason appears from the record why the verdict of the jury should be disturbed. The judgment will accordingly be affirmed.

Affirmed.

Not to be reported in full.

Term No. 29. Agenda No. 7.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

March Term, 1921.

ANDY ELLIOTT, Appellee.		Appeal From Williamson.
vs.		
OTTO RUSH, Appellant.		

Opinion by Higbee, P. J.

This suit was brought by appellee to recover a balance of $1500.00 claimed to be due on the purchase price of a farm sold appellant. A trial resulted in a verdict and judgment for the amount claimed in favor of appellee and this appeal has been perfected by the defendant below, to review the record.

Appellee was the owner of a farm in Williamson county on which a mortgage had been foreclosed. In September, 1916, a short time before the period of redemption had expired, John Edmonds, step-father of appellee, began negotiations with appellant for the sale to him of appellee's farm. Appellant went to see the farm and talked with appellee, who asked $5000.00 for the farm. Appellant offered to pay $3500.00 cash if appellee would take a stallion and jack owned by him for the balance, $1500.00, but this appellee refused to do. It is, however, claimed by appellant that Edmonds agreed to accept his proposition and in so doing was acting as appellee's agent. Edmonds denies that he agreed to take the stallion and jack and both Edmonds and appellee deny he was acting as appellee's agent. Appellee took the stallion to Edmond's home, and as he claims turned him over on the deal. On the contrary Edmonds claims the stallion was not taken by him on the deal but was brought to his home by appellant for breeding purposes. The stallion took sick and died while at Edmonds' place and some days thereafter Edmonds, appellant and appellee met, when the deed was executed and appellant paid the $3500.00. Appellee and Edmonds contend and testified that at this time appellant agreed to give a note for the balance of $1500. Appellant insists the contract was consummated before the stallion was taken to Edmonds, and that appellee owned the stallion when it died. There was quite an amount of testimony in the case concerning another trade between appellee, Joe Rush, a brother of appellant, and a Mr. Jacobs involving some Texas and Missouri land, wherein it was claimed by appellant that Joe Rush was to acquire the Missouri land and trade it to appellee for the stallion and jack. There was also a sharp controversy as to whether Edmonds was acting as appellee's agent, but under the view we take

of this case neither of these points are material to its determination. Appellee contends no contract had been consummated for the sale of the farm at the time the stallion died; that the trade was in fact completed on the day the deed was executed and appellant at that time agreed to pay him $3500.00 cash, and to give him a note for $1500 within a few days but that he never executed the note. In this contention appellee is corroborated by Edmonds, and while appellant denied it the jury was clearly justified in finding for appellee on this question. Several disinterested witnesses testified that appellant, while the stallion was sick at Edmonds' place said in substance that if the stallion died, he would die as his property and he would lose $1000. Under this state of the proof, the jury could not properly have reached a different verdict upon the question of the ownership of the stallion and it is immaterial whether Edmonds was acting as appellee's agent or whether appellee had on another deal with other parties involving the stallion and jack.

Eighteen instructions were given by the court for appellee, and appellant contends that eleven of them were erroneous. While there was no call for so many instructions on the part of appellee and some of them were too verbose and inclined to be somewhat argumentative, yet from a careful examination of them, we are of the opinion there was no serious error in any of them except the twelfth, which required the proof of certain matters of defense to the "satisfaction" of the jury. This requirement in instructions as to the proof has been frequently condemned by our courts and is not to be approved here. It is to be noted, however, that all the other instructions given for appellee, and all of those given for appellant, except one where the same vice appeared in the modification made by the court, the jury were properly instructed that proof of matters sought to be established, either to maintain the case or in defense, must be made by "the evidence" or "the preponderance of the evidence" and we feel satisfied that taking all the instructions as a series together the jury could not have been misled as to the amount of proof required on any proposition. Again in our opinion substantial justice has been done in this case and no other verdict than that given by the jury could have been properly reached by them.

In Beifeld v. Pease, 101 Ill. App. 539, it is said by the Appellate Court of the First District, "As between the two an error of law committed by the court and the judgment which is plainly right and does no injustice, judgment must stand notwithstanding of error of law * * * * and the cases are uniform and numerous that a judgment which is right on the facts will be allowed to stand although error was committed in the giving or refusal of an instruction. If substantial justice has been done, even though improper instructions have been given or proper instructions refused, the verdict will not be set aside," and numerous cases are there cited in support of that doctrine. In Johnson v. I. C. R. R. Co., 165 Ill. App. 19, the Appellate Court for the Second District held that where the evidence fully justified the verdict the judgment should not be disturbed because of slight errors in law in in-

structions, especially where it was apparent from the record that the appellee had a cause of action.

In Gruber v. Adams, 155 Ill. App. 110, the Appellate Court for the Third District sustained a judgment where an erroneous instruction had been given on behalf of appellee, and it is there held, that "unless the giving of an erroneous instruction is such that the appellant has been injured threby, it will not require a reversal of the cause and if the court can see from the facts that the judgment is just and proper and that no other verdict can be returned or judgment rendered upon another trial of the cause, then the case should not be reversed." In Walker v. Co-Op. Coal & Mining Co., 165 Ill. App. 374, the Appellate Court for this, the Fourth District, affirmed a judgment where a faulty instruction had been given on behalf of appellee. We there said, "Where it can be seen that an erroneous instruction did not mislead the jury to appellant's prejudice the error will not reverse." In line with these cases we conclude that in this case where the error in instructions does not appear to us to have been such as should have misled the jury, when all the instructions of the series are taken together, and where the jury reached the only proper verdict which could have been given under the proof, the verdict of the jury should not be disturbed.

Certain criticisms are made by appellant as to the rulings of the court upon the admission and rejection of evidence, but an examination of the same leads us to the conclusion that the rulings of the court in this matter were free from error. The judgment of the trial court will be affirmed.

Affirmed.

Not to be reported in full.

Term No. 32. Agenda No. 37.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

March Term, A. D. 1921.

DANIEL HUDDLESTON, Appellant. v. FLORENCE HUDDLESTON, Appellee.	Appeal from City Court of Alton.

Opinion by HIGBEE, P. J.

On December 31, 1918, appellee Florence Huddleston filed her bill in the City Court of Alton for divorce from the appellant Daniel Huddleston on the ground of desertion and prayed for custody of their minor child Sarah Frances Huddleston.

Appellant filed his written entry of appearance, the cause was heard on default and a decree entered January 4, 1919, granting the divorce and awarding the custody of the child to the mother, no alimony of any kind being awarded. In July 1919, appellee filed a petition for the modification of the decree and praying that the appellant be decreed to pay her $40 per month for the support of their child. Appellant answered this bill setting up that he had an express agreement with his wife that he was not to pay her any alimony or make any contribution toward the support of their child in the event the wife was awarded and retained the possession of the child. Upon hearing the decree was modified and appellant was required to pay the sum of $25 a month to the clerk of the court for the use of Frances Clark, who was the mother of Florence Huddleston and to whom the modified decree gave the custody of the child. This decree was entered July 19, 1919. On May 28, 1920, a petition was filed signed by Frances Clark, but sworn to by both Florence Huddleston and Frances Clark, alleging that appellant had not made the payments required by the decree and asking that a citation issue directed to the sheriff of Macoupin County against appellant to show cause why he should not be punished for contempt of the court on account of his negligence and refusal to make such payments. If this citation directed to the sheriff of Macoupin county were ever issued as prayed by the petitioner, the record does not show it. On December 18, 1920, a citation was issued dircted to the sheriff of Madison county and on that day served upon appellant, who was released under $500 bond to appear in court to answer the same. Appellant entered a special appearance and moved to quash the writ for want of a petition in support thereof and other reasons. The court denied this motion and appel-

lant then filed a plea in abatement to the jurisdiction of the court. The court sustained demurrer to this plea and appellant having elected to stand by his plea, default was entered against him. The bond which appellant gave for his appearance was forfeited and the court, after hearing some testimony fixed the amount of money due under the former decree at $462.50 and awarded execution. From that decree this appeal is taken.

Appellant's plea in abatement alleges in substance that appellant before and at the time of the sueing out of the citation and at the time of the service of the same upon him, was and still is a resident of the City of St. Louis in the state of Missouri, and that he was not at the time said citation was sued out or at the time it was served upon him, a resident of the county of Madison in the State of Illinois. That on the 9th day of December, 1920, Florence Huddleston, the mother of the child and the daughter of the petitioner Frances Clark, and the divorced wife of the appellant, for the purpose of getting appellant into the City of Alton, State of Illinois, where he would be amenable to the process of this court, went before a justice of the peace and swore to a criminal complaint charging that on the 10th day of July, 1919, appellant did unlawfully abandon his minor child, a female under the age of 12 years and left her in destitute and necessitous circumstances, and has since failed to care and provide for her, although in truth and in fact the said Florence Huddleston then and there well knew that on the said 10th day of July, 1919, and for the space of six months and more prior thereto the care, custody, control and education of said child had been in her, the said Florence Huddleston, under and by virtue of a decree of that court entered January 4, 1919, and that said child under the law could not be abandoned by the appellant; that in pursuance of said criminal complaint the said Florence Huddleston procured a state's warrant to be issued for the arrest of appellant well knowing that appellant was a nonresident of the state of Illinois and was then and there residing in and was a resident of the State of Missouri; that in pursuance of said warrant, and through the state's attorney of Madison county, Illinois, said Florence Huddleston procured extradition papers to be issued by the Governor of the State of Illinois, upon the Governor of the State of Missouri, for the arrest of appellant as a fugitive from justice from the State of Illinois; that said extradition papers were thereafter honored by the Governor of the State of Missouri and appellant was arrested in the City of St. Louis in the State of Missouri as a fugitive from justice and brought into the City of Alton on the 18th day of December, A. D. 1920, to answer said criminal complaint and said state's warrant; that while before said justice of the peace on said date arranging for a hearing on said criminal charge and for the giving of a bond for his appearance therein, the said deputy sheriff who had arrested him, then and there served the citation in this cause upon appellant without first giving him an opportunity to leave the state of Illinois, where he had been forcibly brought against his will from his home and residence in the State of Missouri; that the service of citation in this case under such conditions was without warrant of law and that the

court failed to acquire thereby jurisdiction of the person of the appellant in this cause.

The demurrer to this plea admitted the truth of all material matters and things alleged therein. Appellant contends that having been brought within the jurisdiction of the trial court under a criminal process and against his will he was privileged from service of legal process and that the privilege extended in point of time so long as might fairly be required by him in going to and returning from the place of trial.

This contention is undoubtedly based upon a correct principle of law. Willard v. Zehr, 116 Ill. App. 496; Gregg v. Sumner, 21 id. 110; Nichols, Shepherd & Co. v. Goodheart, 5 id. 574.

The argument for appellee practically admits that the greater weight of authority is to the effect that a defendant brought into a state on a criminal process is exempt from the service of civil process, but it is contended by appellee that before such exemption is allowed, it must appear that the party in whose favor the civil process is served was directly or indirectly connected with the bringing of such person within the jurisdiction of the court and this also seems to be the trend of the decisions in this state. Appellee further contends that Frances Clark, who signed the petition for citation, is the real plaintiff or complainant in this cause, and that the plea in abatement does not show that she was directly or indirectly responsible for the bringing of the appellant within the jurisdiction of the court, but that on the contrary the facts set forth in the plea in abatement show that Florence Huddleston was the person solely responsible for the securing of extradition papers and bringing of appellant in this state. Appellant contends that appellee Florence Huddleston was in effect the original complainant in this suit and is still the complainant.

While it is true that Frances Clark signed the petition, yet both Frances Clark and Florence Huddleston swore to it. We are of the opinion that regardless of whether Florence Huddleston or Frances Clark be regarded as the complainant or plaintiff in this case, the facts set forth in the plea, the truth of which must be admitted, sufficiently show that appellee herein was interested in the bringing of appellant within the jurisdiction of the court and was jointly responsible with Frances Clark in causing it to be done, therefore under the above authorities the plea in abatement was good and it was error for the court to sustain the demurrer thereto.

The judgment is reversed and the cause remanded with directions to the court below to overrule the demurrer to appellant's plea in abatemnt and for further proceedings consistent with the views herein expressed.

Reversed and Remanded.

Not to be reported in full.

Term No. 38 Agenda No. 13

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term A. D. 1921.

SAMUEL L. NICHOLS, Executor, etc. Appellee. vs. WILLIAM A. FLEMING, Appellant.	Appeal from Madison.

Opinion by Higbee, P. J.

This was a suit brought by appellee against William A. Fleming and Edward N. Needham jointly, to recover damages for negligently causing the death of Samuel J. Nichols, appellee's intestate.

The declaration consisted of four counts. Each count begins with the following language: "Samuel L. Nichols, Executor of the last will and testament of Samuel J. Nichols, deceased, plaintiff, complains of William A. Fleming and Edward N. Needham, defendants, of a plea of trespass on the case; for that, whereas, the defendants William S. Fleming and Edward N. Needham, before and on, to-wit, February 3, 1920, in the city of Alton county of Madison, state of Illinois, were possessed of, using and operating a certain motor vehicle, commonly known as a truck, which was then and there under the care, control and management of said Edward N. Needham, as a servant, employe and chauffer of the said William A. Fleming, and plaintiff avers that said Edward N. Needham was not then and there a licensed chauffer as provided by the laws of the state of Illinois; and said Needham was then and there driving said truck on Brown and other streets in said city of Alton, toward the crossing of Seminary Street." Count one also charged that the defendants so negligently and improperly drove the truck on certain streets in Alton that it struck and killed Samuel J. Nichols. Count two charged that defendants drove the truck on such streets at a speed greater than was reasonable and proper having regard for the traffic and use of the street; Count three charged that defendants drove the truck at a rate of speed which exceeded 15 miles per hour and count four that defendants recklessly and wilfully drove the truck along the streets of Alton.

On a trial before a jury a verdict was returned finding the defendant Needham not guilty but finding appellant Fleming guilty, and fixing appellee's damages at $2500.00. After requiring a remittitur of $500.00 the court overruled motions for a new trial and in arrest of judgment and entered judgment in favor of appellee for $2000.00 from which appellant appealed to this court. No motion for a new trial in respect to the verdict in favor of the defendant Needham was made and the court en-

tered a judgment in bar of any action as to him and from that judgment no appeal was taken. The proof showed that appellant was not present when his truck in charge of his employe Needham caused the injury complained of. The declaration in this case charged in effect a liability on the part of appellant under the doctrine of RESPONDEAT SUPERIOR, that is to say: that appellant is liable because the negligence charged in the declaration as the cause of the deceased's death, was the negligence of his servant and employe, Edward N. Needham. Appellant contends that he could not be found guilty of nor held liable for the negligence of which his servant and employe was acquitted by the jury, and we think this position is well taken. It is obvious from a reading of the declaration that the GRAVAMEN of the charge in each count is the negligence of the employe Needham, who in the trial below was found not guilty. No appeal was taken from that judgment and under the decisions in this state, it must be held to be finally determined that Needham, the employe was not guilty of the negligence charged. It necessarily follows that if the employe charged with the commission of the acts of negligence complained of, be found not guilty, a judgment could not be sustained against the appellant the principal under the doctrine of RESPONDANT SUPERIOR. Therefore the judgment in this case in favor of Needham is a complete bar to a judgment against appellant for the negligence of his employe, Needham. Such is the well established doctrine of this state. (Hayes vs. Chicago Tel. Co., 218 Ill. 414; Anderson vs. West Chicago St. R. Co., 200 Ill. 329; Antrim vs. Legg, 203 Ill. App. 482.)

It is argued by appellee that appellant is in no position to urge the judgment in favor of Needham as a bar to a judgment aganist him because the motions for new trial and in arrest of judgment did not nor did either of them assign as one of the grounds for the same the verdict finding the employe Needham not guilty. That question was in fact raised and saved for review by this court by the statement in the motion for a new trial that the verdict was contrary to the law and the evidence.

The judgment in this case is reversed and as under the law of this state clearly defined in the cases above referred to there can be no judgment against appellant for the alleged negligence of his employe for which the employe has been found not guilty, the cause will not be remanded.

Finding of facts to be incorporated in the judgment. We find that William A. Fleming, the appellant, was not guilty of the negligence charged in the declaration.

Not to be reported in full.

Term No. 41. Agenda No. 43.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

March Term, A. D. 1921.

JULIA LIPPARD, Appellee. vs. LOURINDA HART, Appellant.	Appeal from Massac.

Opinion by HIGBEE, P. J.

This was an action of assumpsit brought by appellee in the circuit court of Massac county to recover from appellant for the use of certain rooms and furniture and for meals and board.

Appellant is an elderly lady, 74 years of age, single and formerly lived alone in her home in Metropolis, Illinois. Appellee is a married woman and she and her husband formerly lived in the country in said county where appellant had boarded with them. Afterwards appellant and appellee entered into an agreement, the terms of which they do not exactly agree upon, but whereby appellee and her husband moved into appellant's home, and furnished her meals, appellant reserving one room of her home for her own use. It is claimed by appellee that appellant agreed to give appellee and her husband the use of her home "to board her and to take care of her for life" and also to make a will devising to appellee her home and the sum of $500. Appellant denied that she agreed to will the home and $500 to appellee, although she admits there was some talk along that line after appellee had moved in her home. She contends that the agreement was that appellee was to furnish her board for the use and occupancy of all of her home save one room. After appellee had lived in appellant's house about two years trouble arose between them and appellant brought an action in forcible entry and detainer for the possission of that portion of the home occupied by appellee. Judgment by default was entered in that suit in favor of appellant and afterwards appellee brought this suit. Appellant filed a plea of the general issue with a notice of set-off or recoupment for the use and occupation of her house by appellee.

The court permitted the introduction of evidence tending to show the reasonable rental value of that portion of the house occupied by appellee but in effect instructed the jury that this evidence should not be considered by them. By the first instruction given for appellee the court told the jury: "The question of set-off is not involved in this case—that is to say the case does not present the question of whether the

rental value of the house in question is equal to the reasonable worth of the board, or whether it is not. This is a case where the plaintiff contends that she has a right to recover the reasonable worth of the board and keeping of the defendant, and where the defandant contends that the contract was different from that contended for by the plaintiff and under which the defendant contends that she does not owe the plaintiff any sum." The same theory was adhered to in the other instructions given for appellee. A number of instructions were offered by appellant setting up her claimed right of set-off or recoupment, for the use and occupation of her house by appellee, but they were all refused by the court.

The declaration consisted of one count somewhat in the form of a common count, and did not declare specially on any contract. Under the pleadings and unquestioned evidence in this case, appellant was clearly entitled to recoup for the use of the house had by appellee and the theory of the law adopted by the court on this subject in the instructions given for appellee, was erroneous. Appellant's refused instructions stated the law bearing upon her right of recoupment correctly. (Collins v. Thayer, 74 Ill. 139).

For the errors of the court below in reference to the instructions above indicated, the judgment will be reversed and the cause remanded.

Reversed and Remanded.

Not to be reported in full.

Term No. 44 Agenda No. 46

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term A. D. 1921

AB SATTERLEY,
Appellee.

vs.

JOHN BARTON PAYNE, DIRECTOR GENERAL OF RAILROADS, etc.,
Appellant.

Appeal from Gallatin.

Opinion by Higbee, P. J.

This suit was brought to recover damages for injuries to three mules resulting in the death of one of them. Upon trial in the circuit court on appeal from the judgment in the justice court, where the suit was commenced, a verdict was returned in favor of appellee for $250.00 and from the judgment rendered on that verdict this appeal has been taken.

The tracks of the Louisville and Nashville Railroad Company and the Baltimore and Ohio Railroad Company, running from Shawneetown are about 200 yards apart and run parallel for a distance of about a quarter of a mile to a point called the "Y" or junction. From this "Y" or junction both companies use the same track for about six miles to the Village of Junction. Appellee owns land on both sides of this track after it leaves the "Y". On the morning of February 12, 1920 three of his mules, which he had in a field along this track, were discovered injured on the right of way near a trestle. One of them had a broken leg and it was necessary to shoot it. The legs of another, a gray mule, were badly skinned. The third, a brown mule it is claimed, had, as a result of its injuries a weak back and could not be worked around the farm. It seems to be conceded that there was not a sufficient fence along the right ofway. There was no direct evidence as to how the mules were injured but it was shown that there was hair found on the trestle. Appellee himself testified that the brown mule, the one with the weak back, had started across the trestle, and fallen into the creek below, about one-third of the way across. It was also evident that there were mule tracks leading across the trestle and possibly back. At the close of appellee's testimony appellant requested the court to give the jury a peremptory instruction to find for the defendant, but the court refused to do so.

The court upon the trial gave the following instruction for appellee: "If you find for the plaintiff you must find a reasonable market value for the animal so killed or injured because of the negligence of the company's employes if any such negli- has been shown under the instructions that have been given you. You are the sole judges of the credibility of the witnesses and weight to be given to their testimony. You will take into consideration all the testimony in the case, and if you find by a

preponderance of the evidence that the plaintiff has made out his case according to the instructions given you, then your verdict should be for the plaintiff in such sum as the evidence shows the stock worth and damage done, if any, not to exceed, however, the sum of $300." This instruction does not state the correct rule as to the manner of determining the damages. So far as the mule which had to be shot, is concerned, the correct measure of damages would be its market value, but such would not be the measure of damage for the injuries done the other two mules. This is so obvious and well established that it does not require the citation of any authorities. It was clearly error to give this instruction. The court also gave the following instruction in behalf of appellee: "You are instructed by the court, a railroad company operating a railroad in this state is required to securely fence its track and when this is not done the railroad company so operating the railroad, whether it be the owner of said track or not, is liable for all damages done to stock by its locomotive and cars while being operated upon its road, without regard to the question of whether such injury was the result of wilful misconduct or negligence or the result of unavoidable accident." While this instruction does not constitute of itself reversible error, yet it was quite broad as applied to the facts in this case and was to some extent misleading. It should have plainly confined the damages to injuries resulting from the insufficiency of the fence which does not appear to have been clearly done. The statute requiring railroad companies to fence their right of way provides in substance that where live stock gets upon the track because such fences are not kept in good repair, the railroad company shall be liable for all damages which may be done by the "agents, engines or cars" of the company. It is contended by appellant in this case that unless the evidence shows the injuries to the mules were caused by contact with its cars or engines it is not liable and this contention is in our opinion well taken. (I. B. & W. Railway Co. vs. Schertz, 12 Ill. App. 304; C. & N. W. Ry. Co. vs. Taylor, 8 id. 108; Stump vs. C. & G. Ry. Co. 84 id. 28). No one testified to seeing the animals struck by a locomotive or cars. Three witnesses for appellee did testify that they saw the two morning trains either stop or almost stop at this point. The crews of these two trains testified that they did not stop but that the mules were on or near the tracks and that they slowed down and almost came to a stop. Appellee himself testified that there were no cuts, bruises or lacerations upon the mule with the broken leg, and that its skin was not laid open nor was there any blood. That the brown mule had started across the trestle and fallen when about one-third of the way across, and that it looked as though the mules had attempted to run over the center of the trestle from one end to the other. Other witnesses in behalf of appellee, including a veterinarian, also testified there were no cuts or bruises on the mule with the broken leg. Three of his witnesses testified that they saw the morning train stop at this place, but they were some distance away and did not see the mules, and did not see what if anything caused the train to stop. It was shown that the mules were found in an injured condition on the right of way, and appellee relies upon the case of I. C. R. R. Co. vs. Whalen, 42 Ill. 396 as sustaining his contention that such proof is sufficient to justify the jury in finding that the injury was done by the "agents, engines or cars" of the appellant. We cannot

agree to this contention under the circumstances shown to exist by the evidence in this case. Upon a consideration of all the proof we conclude that appellee failed to make out his case by a preponderance of the evidence.

The judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

Term No. 56 Agenda No. 19

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term A. D. 1921.

FRANK SMITH, Appellee. vs. EAST ST. LOUIS & SUBURBAN RAILWAY COMPANY, Appellant.	Appeal from Madison.

Opinion by Higbee, P. J.

This suit was brought by appellee to recover damages for injuries sustained by him in the same accident involved in the case of Orval Dickson against the East St. Louis and Suburban Railway Company, in which an opinion has been filed by this court at this term. In this case appellee secured a verdict and judgment for $4000.00.

No question is made by appellant as to the right of appellee to recover damages in this case but it insists that the damages found by the jury in their verdict were excessive and that for such reason the judgment should be reversed. It is claimed by appellee that by the collision which caused the injury he was thrown from his seat near the rear end of the smoking compartment of the electric car in which he was riding, through a partition onto the floor on the aisle of the passenger compartment, where he lay unconscious for sometime; that his right shoulder was skinned and dislocated; that he suffered severe pain in the stomach; that he walked a distance of some 1200 feet to a work car of appellant, upon which he was conveyed to the office of appellant's local surgeon and later went to a hospital in East St. Louis where the dislocation was reduced and his shoulder bandaged; that a few days later the same physician again examined him and found a distinct rupture; that the rupture which is designated by the medical witness as a "inguinal hernia" was a serious one; that both injuries were permanent and still causing appellee pain at the time of the trial; that he was unable to perform any physical labor from May 28, 1920 the date of the accident until October 3, 1920; that he was still lacking the physical power to perform manual labor as he had been accustomed to before the accident.

Appellant's contention was that appellee's injuries both as to his dislocated shoulder and alleged hernia or rupture were much overdrawn and exaggerated and that he had been afflicted with rupture before the accident here complained of; that the hernia might be cured by an operation but that appellant refuses to submit to same, although it would not be of a serious nature.

The evidence concerning appellee's injuries was submit-

ted to the jury under proper instructions given for appellant and while the extent of the injuries suffered by appellee was a matter upon which there was a conflict, yet that was a question for the jury to determine under all the proof in the case. What was said concerning the claimed excessive damages in the case of Dickson vs. East St. Louis and Suburban Railway Company, above referred to will apply with equal force to this case and for the reasons there given as applicable to the same question, the judgment in this case will be affirmed.

Affirmed.

√ Not to be reported in full.

Term No. No. 57. Agenda No. 31.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

March Term, A. D. 1921.

GLEN CARBON MERCANTILE COMPANY,
Appellee.
v.
THOMAS WILLIAMS,
Appellant.

Appeal from Madison.

Opinion by HIGBEE, P. J.

This suit was brought to recover the balance due on an account which appellee held against appellant. In the Circuit Court to which the case was taken on appeal, from a Justice of the Peace, a jury was waived, and the court having found the issues for the appellee, gave judgment in its favor for $268.63, the full amount of its claim.

Appellee conducts a general merchandise store at Glen Carbon, Illinois, and appellant is a coal miner residing in the same town. Prior to October, 1914, the store was conducted on a credit basis, but during the latter part of 1914, a cash system was inaugurated, after which no credit was extended. During the time the store was on a credit basis appellee used a duplicate slip system to keep its accounts. At the time of making a purchase the entry would be made on a slip and carbon copy made. The items were totaled and added to the previous balance, if any, or if payments were made these were indicated on the slips and deducted, and the balance shown, so that each slip would show the balance due. The duplicate was given to the customer and the original kept by the merchant. Appellant's wife did all the buying for the family of general merchandise and household supplies until her death in April, 1919. Appellant testified he did not do the buying but authorized his wife to do so. This suit was for the balance due on appellant's account as it stood in 1914 when the credit system was abandoned. The slips showing the account were introduced in evidence. Appellant did not deny the correctness of the account but relied solely upon the statute of limitations. No slips were given appellant's wife for purchases made after the store went on a cash basis, but she continued with the knowledge and consent of appellant to do the buying for the family by the use of coupons issued by appellee payable out of an order made by appellant against his employers for his wages. During each of the years 1915, 1916, 1917, 1918 and 1919, appellant's wife applied some of these coupons upon the old account. Upon each of such payments being made a slip was given her showing the previous balance, the amount of the payment and the balance remaining due. Ap-

pellant contends these payments were made without his knowledge and did not operate to toll the statute of Limitations as against him.

If these slips showing the balance due, had been given to appellant and he had made the payments himself, there is no question but that the account would be deemed a stated account and the payments would have tolled the Statute of Limitations. (State v. Ill. C. R. R. Co. 246 Ill. 190; Wurlitzer v. Dickinson, 153 Ill. App. 36).

The proof clearly shows that appellant's wife was his general agent to make purchases of appellee, consequently payments made on the account by her as such agent, would toll the Statute the same as if made by appellant.

It is contended by appellant that while a wife may bind the husband so as to make him liable for the cost of the family necessities, yet after the debt is contracted, the wife has no authority to make any contract concerning the debt so as to bind the husband, and that in this case it was incumbent upon appellee to show that some authority was given by appellant to his wife aside from the implied authority of a wife to bind her husband for necessaries. Undoubtedly this is the law, but appellee did show that appellant's wife was his general agent in dealing with appellee, and we hold that payments made on the account by her as such agent, operated to take the case out of the Statute of Limitations and therefore the judgment of the trial court should be affirmed.

Affirmed.

Not to be reported in full.

Term No. 4 Agenda No. 3.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

March Term, 1921.

GEZA LENGZEL,
Appellee.
vs.
SOUTHERN ILLINOIS RAILWAY & POWER CO.,
Appellant.

Appeal from Saline Circuit Court.

BARRY, J.

This is an appeal from a judgment in favor of appellee and against appellant for damages to the automobile of appellee caused by a collision at a highway crossing. The action is based on the negligence of appellant's motorman in the management of an interurban car while appellee was in the exercise of ordinary care for his own safety.

It is contended by appellant that appellee was guilty of contributory negligence and that the court erred in refusing to peremptorily instruct the jury to find a verdict in its favor. A court can never be called upon to say to a jury that contributory negligence has been established as a matter of law unless the conduct of the injured party has been so clearly and palpably negligent that all reasonable minds would so pronounce it without hesitation or dissent, L. S. & M. S. Ry. Co., vs. Johnson, 135 Ill., 641.

From a careful consideration of all the evidence we are of the opinion that the questions of negligence and contirbutory negligence were questions of fact and were properly submitted to the jury. The testimony on behalf of appellee tended to show that he was in the exercise of ordinary care and that the collision was due to the negligence of appellant.

While the evidence is not altogether satisfactory, yet as the jury was fully and fairly instructed and no error is claimed in the admission or exclusion of evidence, we feel that we would not be warranted in holding that the verdict is manifestly against the weight of the evidence. The judgment is affirmed.

Affirmed.

Not to be reported in full.

Term No. 17. Agenda No. 9.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

March Term, 1921.

CITY OF EDWARDSVILLE,
Appellee.

vs.

CENTRAL UNION TELEPHONE COMPANY,
Appellant.

Appeal from Madison County Circuit Court.

BARRY, J.

Appellee sued appellant in debt and alleged that said company occupied certain portoins of the streets and alleys in the city of Edwardsville during the years 1914, 1915, 1916, 1917 and 1918, without paying into the city treasury, on the first day of September of each year, fifty cents for each pole over eight feet high used by said company, as required by a certain ordinance of said city known as ORDINANCE No. 369, and which was in full force and effect since July 10th, 1914.

Appellant pleaded the general issue and by special pleas sought to show that said ordinance No. 369 relied upon by appellee as the basis of its action is unconstitutional in that it violates Section 10, Art. 1, and the 5th Amendment to the Constitution of the United States, and also sections 2 and 14, Art. 2 of the Constitution of the State of Illinois. A demurrer was sustained to each of the special pleas.

A jury was waived and the cause submitted to the Court on a stipulation of facts showing that in July, 1882, Appellee adopted Ordinance No. 72 granting to the Central Telephone Company, its successors and assigns the right of way through and upon its streets and alleys with the right to erect, maintain and use all necessary poles, &c., for the successful operation and use of a system of telephones or a telephone exchange in said city, setting out said ordinance in full.

That upon the passage and approval of said Ordinance No. 72, said Central Telephone Co., accepted the same and entered upon the enjoyment of the rights thereunder and in performance of the duties and obligations therein required. That prior to September, 1897, said Central Telephone Co. conveyed and assigned to appellant all its rights and powers under said Ordinance and that said Central Telephone Co. and appellant had performed all of the obligations imposed by said Ordinance.

That on Sept. 7th, 1897, Appellee adopted a certain resolution requesting Appellant to furnish Appellee one set of telephones for its use without pay, and any other additional telephones it might desire for its use at a discount off 25 per

cent from the usual rates. This resolution was accepted by Appellant and it complied with the terms of said resolution from thnce hitherto.

Appellant sought to defend on the ground that upon the acceptance of Ordinance No. 72 and the Resolution aforesaid a contract was created and additional burdens in the way of compensation for the use of the streets and alleys as required by Ordinance No. 369 could not be imposed because of the constitutional provisions refrred to.

The trial Court held by Appellee's 6th proposition of law that Ordinance No. 369 does not violate the Constitution of the United States, nor that of the State of Illinois. The Court refused to hold Appelant's 7, 8, and 9th propositions of law wherein it was asked to hold that said Ordinance contravenes Section 10, Art. 1 and the 5th Amendment of the Constitution of the United States, and Sections 2 and 14, Art. 2 of the Constitution of the State of Illinois.

Appellant has assigned errors in this Court to the effect that the trial Court erred in sustaining the demurrer to each of its special pleas, in holding each of Appellee's propositions of law and in refusing to hold each of Appellant's refused propositions of law.

It will be seen, therefore, that the Constitutionality of said Ordinance No. 369 upon which Appellee recovered in the Court below, was squarely raised and decided and is presented to this Court by the assignment of errors. In our opinion this is not a case where we can say that by taking the Appeal to this Court Appellant has waived the constitutional question, but we are constrained to hold that we are without jurisdiction.

The question involved is not one of construction, but of the validity of the Ordinance. No issue is presented except such as makes it necessary to determine whether the Ordinance violates the Constitutions of the United States or the State of Illinois.

While the City Court Act was held constitutional in Chicago, T. T. R. R. Co. vs. Grier, 223 Ill., 104, the Supreme Court took jurisdiction of an appeal direct from the Circuit Court when the Act was again attacked as unconstitutional in a suit where the organization of a City Court in a City, comprising portions of two counties was questioned, and it was held that the Act was constitutional but did not apply to a City so located. People vs. Rodenberg, 254 Ill., 386.

Where it was contended that Section 13 of the Practice Act applied to non-residents of the State as well as non-residents of the County, and was, therefore, unconstitutional, the Supreme Court took jurisdiction on a direct appeal from the Circuit Court and construed the Statute as not applying to non-residents of the State and held it was constitutional, Joel vs. Bennett, 276 Ill., 537.

In the case at bar the question is whether Ordinance No. 369 is applicable to Appellant, and, if so, whether it was a constitutional exercise of power on the part of Appellee to enact it. The constitutional question is therefore involved so as to

require the appeal to be taken to the Supreme Court, Barrett Mfg. Co., vs. City of Chicago, 259 Ill., 578-587.

It follows that if we are right in our conclusions it is our duty under Sec. 102 of the Practice Act to transfer this cause to the Supreme Court, Jackson vs. Winans, 287 Ill., 382.

It is therefore ordered that this cause be and the same is hereby transferred to the Supreme Court and the Clerk of this Court is directed to transmit the transcript and all files therein with the order of transfer to the Clerk of that Court.

Cause Transferred to Supreme Court.

Not to be reported in full.

Term No. 34 Agenda No. 12

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term, A. D. 1921

JOHN WENDZINSKI, Appellee. vs. MADISON COAL CORPORATION, Appellant.	Appeal from Madison County Circuit Court.

Opinion by Barry, J.

This case was here on a former appeal, and is reported in 203 App. 1. At that time the declaration consisted of three counts, the first charging statutory negligence, and the others common law negligence, and the judgment was against appellant herein and its mine manager. We held that appellee has established a cause of action under the first count and affirmed the judgment.

The cause was afterwards heard by the Supreme Court and is reported in 282 Ill., 32, where it was held in effect that appellee was entitled to recover against Madison Coal Corporation under the first count of the declaration, but the judgment was reversed because there was no joint liability.

Upon reinstatement of the case in the Circuit Court, appellee withdrew the second and third counts of the declaration and dismissed as to the mine manager. The evidence on the former appeal and the questions raised and considered were in all substantial respects the same as they now are, with the exception of the plea in abatement. This court and appellant must accept the decision of the Supreme Court as the law of this case.

Prior to the last trial of the case, with the general issue pleaded, appellant filed an unverified plea in abatement to the effect that appellee was and is an alien enemy. Upon a motion to strike the same from the files appellant took leave to and filed a verification of the plea and the court then allowed the motion and struck the plea from the files. Appellant's contention that the court erred in so doing is without merit because the plea was not amendable; Spencer vs. Aetna Indemnity Co., 231 Ill., 82. The plea was also insufficient under numerous decisions cited in Kristel vs. Mich. Central R. R. Co., 213 App., 518, and also because it was filed after general issue pleaded and without withdrawing that plea; Fisher vs. Cook, 125 Ill., 280.

In our opinion the evidence fully warranted the verdict and no claim is made that it was excessive. There being no reversible error the judgment is affirmed.

Affirmed.

Not to be reported in full.

Term No. 43 Agenda No. 45

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term A. D. 1921

JAMES CASLIN,
Appellee.

vs.

MIKE OPICH,
Appellant.

Appeal from
Madison County
Circuit Court.

Opinion by Barry, J.

Appellee recovered a judgemnt for $250.00 on account of damages to his car in a collision with Appellant's car alleged to have been occasioned by the negligence of Appellant while Appellee was in the exercise of ordinary care.

Broadway is a public street in the city of Venice, running in a Northeasterly and Southwesterly direction. Third street runs in a Northerly and Southerly direction and into Broadway without crossing it. The evidence on behalf of Appellee fairly tends to show that at the time in question he was driving to the Northeast on Broadway on the right-hand side of the street as he approached Third Street. That at the same time Appellant was driving on Broadway approaching Third Street from the opposite direction. Appellee intended to proceed along Broadway, but Appellant was going to turn from Broadway into Third Street and go South on that street. That when Appellee reached and entered upon Third Street Appellant, without giving any warning of his intention so to do, suddenly turned diagonally across Broadway in front of Appellee and before he had passed west of the center of Third Street, thereby entering on the left-hand side of Third Street.

That there was a sharp conflict in the evidence is admitted by Appellant. In fact his counsel say it was a conflict which can not be reconciled, that if Appellant's story is true, Appellee's is false and *vice versa*. We are of the same opinion and the questions of negligence and contributory negligence were for the jury to determine. Under the admitted state of the evidence we would not be warranted in holding that the verdict is manifestly against the weight of the evidence.

It is argued that Appellee's car was damaged to the extent of $531.00 as shown by the evidence, and that the verdict should have been for that sum or nothing. That the fact that the verdict was for but $250.00 demonstrates that the verdict was a compromise, or the result of bias or prejudice.

Where there is no dispute as to the amount, and the jury having found for the plaintiff, should have rendered a verdict for the entire sum, but gave one for less, the plaintiff only can complain of such verdict. The defendant is not entitled to a reversal of the judgment, because it is more favorable to him than

the case made by the plaintiff would justify; Starks vs. Schlensky, 128 App. 1-3; Jones vs. Bates, 179 App., 578. There is nothing to indicate bias or prejudice on the part of the jury.

Appellant contends that the Court erred in refusing his second refused instruction which informed the jury that if they believed from the evidence that the defendant, when he approached the street intersection in qustion, saw the plaintiff at such a distance therefrom that the latter, if traveling at a lawful and prudent rate of speed, would not have collided with the deendant, then he had a right to presume that plaintiff would use such lawful and prudent speed and had a right to cross the street as he did in this case.

Under that instruction even though Appellant saw that Appellee was unaware of the former's presence and saw that Appellee was running at a high rate of speed, or even though Appellant was signalled by Appellee that he was going ahead Appellant would have the right to ignore those facts and presume as stated in the instruction. Such is not the law and the instruction was properly refused; Todd vs. Chicago City Ry. Co. 197 App., 544.

Then, again, the instruction informed the jury that under the circumstances stated, Appellant had the right to cross the street as he did in this case. Under his evidence he crossed the tended to show that he cut across diagonally before passing the street in a proper manner but that on behalf of Appellee fairly center of Third Street. In other words that he was on the left-hand side of Broadway and also on the left side of Third Street, when the collision occurred.

The driving of a motor vehicle on the wrong side of a road is *prima facie* evidence of negligence, F. C. Weber Co., vs. Stevenson Grocery Co., 194 App., 432. It necessarily follows that the instruction would invade the province of the jury and was clearly erroneous. As the record is free from reversible error the Judgment is affirmed.

Affirmed.

Not to be reported in full.

Term No. 47 Agenda No. 48

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term A. D. 1921.

J. G. GARDNER, Appellee. vs. N. M. HARRIS, Appellant.		Appeal from Pulaski Circuit Court.

Opinion by Barry, J.

Appellee recovered judgment against Appellant for the possession of certain premises in an action of Forcible Entry and Detainer.

It is contended by Appellant that the notice to quit was waived when Appellee subsequently received rent from him. That would be true if he accepted rent that accrued after the notice was served, but the law is that the landlord does not waive his notice to quit by thereafter receiving rent which had accrued prior to the service of the notice, Robbins vs. Conway, 92 App., 173.

It is claimed that the notice to quit should have been given 30 days prior to the expiration of the rent month or the beginning of the new month. While that is true, yet the record does not disclose any such objection on the part of Appellant in the Trial Court. Questions not raised below can not be relied upon in this Court as a ground for reversal.

The contention that the description of the premises in the notice, complaint and judgment is insufficient, is without merit. The description was reasonably accurate and a surveyor would have no difficulty in locating the premises; nothing more is required, Stillman vs. Polis, 134 Ill., 533; Haynes vs. Sherwin Williams Co., 126 App., 414.

The lease rested in parol and the terms thereof had to be determined by the jury. The evidence supports the verdict, and the Court properly refused the peremptory instruction requested by Appellant, and no other instruction was asked by either side.

There is no error in the record and the jugdment is affirmed.

Affirmed.

Not to be reported in full.

Term No. 58 Agenda No. 18

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term A. D. 1921.

MAE BLACK, Appellee. vs. BERNS DUANE TIBBETTS, et al. Appellants.	Appeal from Madison Circuit Court.

Opinion by Barry, J.

An employee of appellants was driving a motor truck loaded with furniture and covered with a tarpaulin, the rear left hand corner of which was flapping. The truck was going north on the highway and met Appellee who was driving a horse and buggy. When appellee saw that the driver of the truck was not going to turn out, she pulled over to the west side and stopped with the right wheels of the buggy in the ditch or gully. In passing the driver of the truck did not turn to the right of the center of the beaten track and when the truck was about even with the horse the flapping tarpaulin frightened him and he snorted and jumped, throwing the buggy against a telephone pole nearby. Appellee was thrown and her right limb caught between the axle and the springs of the buggy and there was a compound fracture of both bones below the knee. She was in the hospital for several weeks and submitted to several operatitons, and her limb is a half inch or more shorter than the other.

Appellee set up the said facts in her declaration and charged appellants with a violation of the statute; J. & A. Sec. 10016. They pleaded not guilty, and on the trial appellee recovered a verdict for $5,000.00. A motion for a new trial was overruled and judgment rendered on the verdict.

The driver of the truck admitted he saw appellee 75 or 100 feet ahead and that he did not turn to the right of the center of the beaten track. This was PRIMA FACIE evidence of negligence; Weber Co. vs. Stevenson Grocery Co., 194 App., 432. The evidence shows that prior to the accident his attention had been called to the fact that the rear left hand corner of the tarpaulin was loose and flapping, and that it might scare a horse. No reasonable excuse was shown for his failure to turn out.

The evidence shows that appellee was in the exercise of ordinary care for her safety. The Court very properly refused the peremptory instructions requested by appellants.

Appellants refused instructions were properly refused because they were argumentative in form and were not accurate statements of the law. In our opinion the jury was fully and fairly instructed, and the damages are not excessive.

The judgment is therefore AFFIRMED.

Affirmed.

Not to be reported in full.

Term No. 18 . Agenda No. 5

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term A. D. 1921.

THE PEOPLE, ETC. for the Use of Thomas F. Aldrich and Frank C. Roberts, Appellants. vs. WALTER E. KIMBRO and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Appellees.	Appeal from the Circuit Court of Union County.

Opinion by Boggs, J.

An action in debt was brought by appellants in the Circuit Court of Union County on the official bond of Walter E. Kimbro as Sheriff and the Fidelity and Deposit Company of Maryland, surety, to recover damages alleged to have been suffered by Thomas F. Aldridge and Frank C. Roberts, usee appellants, on account of the alleged failure of said sheriff to take a sufficient bond on replevening certain property on behalf of one T. J. Morris from said usee, appellants.

In the spring of 1915 T. J. Morris as sub-contractor under McCann Bros. undertook to do certain levee work in said county near Aldridge. Morris and his wife brought with them the property in question in this suit, namely: a 25-horse power traction engine; elevator grader, five dirt wagons and certain double-trees. McCann brothers in making payment on said subcontract delivered the checks to T. J. Morris, and they were deposited in the bank at Grand Tower. The greater number of said checks were passed to the credit of Mrs. Morris. Mrs. Morris checked against said account in payment of the expenses connected with said levee work. Appellant Aldridge was operating a store at Aldridge and sold supplies to the Morrises. The store account was first charged to T. J. Morris but was afterwards changed to the name of Mrs. T. J. Morris.

The evidence on the part of appellants tends to show that when the first payment was made by the Morrises on said store account, being something like $500. the check was signed by Mrs. Morris. She stated at said time "that the engine and all of the property and all the teams belonged to her and the old man." The evidence tends to show Mr. Morris made reply, "I am just running this property, it all belongs to her"; (referring to his wife). The evidence on the part of appellant further tends to show that thereafter all payments were made by Mrs. Morris on the account for merchandise furnished by Aldridge. On the completion of the levee work about October 1, 1915, the Morrises left Union County, taking with them their teams, but leaving the above-mentioned engine, wagons, grader, etc. Thereafter The Carni-Goudie Manufacturing Company brought suit in the Circuit Court against Mrs. T. J. Morris and

attached the above property in question and obtained judgment at the November Term 1915. A special execution was awarded against said property. The property was sold at public sale by the sheriff through a deputy on the 27th day of December, 1915, to Appellants for the sum of $315. On April 12, 1916, T. J. Morris brought suit in replevin against appellant Thomas F. Aldridge and on the same day the property was delivered to him by the deputy sheriff under said writ. Morris shipped the property at once and since then the whereabouts of the property and the Morrises are not disclosed by the record.

At the June term 1916 of said Court, being the return term of said Replevin suit, appellant Aldridge objected to said replevin bond on the ground among other things that it was not double the value of the property replevened. The court thereupon ordered a new bond in the sum of $5000. The bond not being filed in the time fixed by the court, said replevin suit was at the November Term, 1916, dismissed and a return of the property ordered. The property not being returned and having been taken out of the jurisdiction of the court, appellants brought this suit to recover the value thereof.

The declaration consists of two counts, known as the amended declaration and the first additional count. The amended declaration avers the value of the property to be $2500. and that the sheriff wrongfully and in bad faith, took an interlineated, faulty, insufficient and improperly drawn and executed replevin bond, and that Aldridge, at the time of the execution and delivery of said bond and before said property was replevined, notified the Sheriff that said bond was illegal and insufficient. The additional count charges in effect that the value of the property was $2500. and that the sheriff did not take a bond in double the value of the property. The bond taken being in the sum of $630.; alleging damages, etc.

To said declaration five pleas were filed, viz.: plea of non damnificatus; plea of non est factum; a plea setting forth that the replevin suit had not been tried on its merits but was dismissed for failure to give bond; a plea that the sheriff made diligent inquiry and investigation as to the value of the property in question and that after such inquiry and investigation and in good faith, believed the value of said property to be not in excess of $300.; said plea denies that appellants, or either of them, notified the Sheriff the bond was illegal or insufficient; or that appellants objected to said bond at any time prior to the taking of said property and concluded with a verification. The fifth plea avers that the fair cash market value of said property did not exceed the sum of $300. and denies that appellants, or either of them, objected to said bond or notified the Sheriff the same was illegal or insufficient before taking the property. Demurrers were filed to said pleas which were overruled by the court and issues were taken thereon.

The testimony on the part of appellants tended to show that the value of the machinery, wagons, implements, etc. replevined were greatly in excess of $315. and in fact was in excess of $1500. The evidence on the part of appellee tends to show that the value of the engine was about $250 or $300. but the value of the remainder of the property was not shown.

A trial was had resulting in a verdict in favor of appellee. A motion for a new trial made by appellants was overruled and judgment was rendered by the court on said verdict in bar

of action and for costs. To reverse said judgment this appeal is prosecuted.

It is first contended by appellants that the verdict is against the manifest weight of the evidence. As the judgment in this case will have to be reversed for the giving of erroneous instructions on the part of appellee and the modification of certain instructions on the part of appellants, we will refrain from expressing any opinion on the weight of the evidence, other than to say that the evidence in the record is of such a character that it becomes a matter of importance that the jury be correctly instructed.

An unusually large and unnecessary number of instructions were given by the court, both on behalf of appellants and on behalf of appellee. Before passing on these instructions we want to state the law applicable to the facts in this case as we understand it. In doing so it will in a large measure state our reason for holding certain of the instructions modified on behalf of appellant to have been erroneous, and in our holding that the giving of certain instructions on behalf of appellee constituted error on the part of the trial court.

One of the material questions involved in this case is as to whether or not appellee, Kimbro used that degree of care and diligence required of him by law in ascertaining the value of the property replevined. The law is, that the bond required of a plaintiff in a replevin suit is not only for the protection of the officer executing the return, but also for the benefit of the defendant in the replevin suit. Mayer vs. The People, 190 Ill. 109.

Counsel for appellee apparently holds to the theory that all that it is necessary for them to show is that the sheriff in taking the replevin bond in question acted in good faith. This is not sufficient. People for use, etc. vs. Core, 85 Ill. 248; People vs. Robinson, 89 Ill. 159; Robinson vs. People for use, etc. 8 Ill. App. 279.

In People for use, etc. vs. Core, supra, the court at page 252 says, "But appellees claim, that if the officer acted in good faith, and there was nothing to excite his suspicion that Howard's affidavit was false, he should be protected. This is not a question of good faith, but a question whether the sheriff has performed his duty. Suppose an officer acts in good faith under circumstances that no prudent man of ordinary intelligence would regard as proper, would any person say in that case the officer should be justified? He must act with judgment and discretion in determining the manner in which he shall perform his duty. He has no right to substitute his belief of what is right, in opposition to the law, however good its intentions may be. The law has made him virtually the agent of both parties, and it has prescribed his duty whilst so acting, and he has no right to substitute his opinion, however honest, for the requirements of the law. It has spoken, and he must obey. The case of The People vs. Haines, 5 Gilm. 528, is referred to, as sustaining this proposition. That case does place some stress upon the good faith of the officer; but from all that is there said, it will be seen that good faith avails nothing, unless the officer uses the best means of forming a correct opinion as to the value of the property. It is there said: 'The requirement of the law is answered if the commissioner has availed himself of the best means of forming a correct opinion of the value of the property mortgaged, and believes that it is of the required value.' Thus

it is seen, in that case the best means of forming a correct estimate of the value must be resorted to for the purpose; and when the officer is to be protected, according to that case, he must use the best means, which implies more than ordinary care and excludes all omission of duty."

In Robinson vs. The People, supra, the Appellate Court of this district at page 282 says: "The fact that the sheriff in taking the replevin bond acted honestly and fairly and in the exercise of his best judgment and upon such inquiry as he may have made, believed the bond was reasonable and sufficient, would not protect him from liability if the bond or security thereon was insufficient. Something more than honesty and good faith and some very slight degree of examination and inquiry, would be necessary in order to relieve him from responsibility. And then his judgment at its best may have been rash and indiscreet. While the sheriff is not an insurer, yet he is bound to take 'security understood by well informed men to be responsible.' People vs. Robinson supra."

It is next contended by appellants that the court erred in modifying instructions Nos. 13, 14, 15, 16 and 17 given on behalf of appellants. Instruction No. 13 as tendered by appellants purports to state the law as to the effect so far as creditors are concerned of a property owner allowing a third person to hold himself out as the ostensible owner of said property. The court modified this instruction by interlining in the same "and knowingly permits her to retain possession of same." We think this modification was erroneous in view of the evidence in the record. The evidence tends to show that Mr. and Mrs. Morris, being husband and wife, were living together. The husband superintending the work on the construction of the levee in question and his wife was doing the cooking. The evidence further tends to show that while checks for the work were delivered to the husband, they were turned over to the wife and were deposited in her name in the bank and checks were drawn by her in payment for the work and in payment for the necessary expenses for the household, etc. . The evidence on the part of appellants also tended to show that Mrs. Morris was claiming to be the owner of the property replevened and that the husband in her presence statd to Mr. Aldridge the party here involved, that the horses, engine and other appliances used in connection with said work belonged to Mrs. Morris and that he was simply running the same. If all these matters are true then the jury would have the right to find that Mrs. Morris was with the permission of her husband holding herself out to be the ostensible owner even though she was not in the actual possession of the property in question.

The same observation will apply to the modification of appellants' instruction No. 14. With reference to the modification of appellants' instruction Nos. 15, 16, and 17, will say that we are of the opinion the court did not err in making said modifications.

Complaint is made of instruction No. 16 a. We have examined this instruction and are of the opinion that the court did not err in giving same. The next instruction complained of is instruction No. 23.. Said instruction is erroneous for the reason that the jury were told that if they believed from the evidence that the property in question belonged to T. J. Morris that then they should find the issues for appellees. This in-

struction wholly omitted the question as to whether or not T. J. Morris held his wife out as the ostensible owner of said property.

The next instruction of which complainant is made is appellees' instruction No. 26. Said instruction informs the jury that unless the plaintiffs (appellants here) satisfies the jury throughout the entire case in the coures of the trial, etc. they cannot recover. This instruction is erroneous as requiring a stronger degree of proof on the part of appellants than the law requires. Sonneman vs. Mertz, 221 Ill. 366; Lathrop vs. Carroll 155 App. 653.

Instruction 30 given on behalf of appellee is erroneous in failing to require the jury to base their belief on the evdience in the case. Instruction 31 given on behalf of appellees is argumentative and misleading and should not have been given. Instruction 32 given on behalf of appellees states to the jury that "one of the means of ascertaining the market price of goods is what such goods sell for upon the open market at a fair cash sale." There was no evidence in the record as to what any goods sold for on the market except the sale of these goods in question by the sheriff to appellant Aldridge, so for that reason we do not think that this instruction should have been given.

Instruction 34 given on behalf of appellees informs the jury that "if you believe that the defendant, Kimbro previous to the issuance of the replevin writ had reliable and accurate information as to the value of the property upon which he relied, in good faith, then it was not necessary for him to make further investigation of such value after he was given the replevin writ to serve. There is no evidence in the record on which to base this instruction as there is no evidence tending to show he had accurate knowledge of the value of said property.

Instruction 35 given on behalf of appellee is as follows: "One of the issues in this case is whether or not T. J. Morris was at the time of the service of the replevin writ the owner of the goods in question, and you are instructed that if he was such owner, as shown by the evidence, then you must find for the defendants." This instruction omits the issue as to whether or not T. J. Morris held his wife out as the ostensible owner of said property.

Instruction 36 given on behalf of appellees is also erroneous. Said instruction directs a verdict and fails to submit to the jury the question as to whether or not T. J. Morris held his wife out as the ostensible owner of said property.

Instruction 37 given on behalf of appellees refers the jury to the affidavit for continuance which stated that T. J. Morris and Mrs. T. J. Morris, if present would testify to certain things and then states, "if, after considering said evidence you believe T. J. Morris owned the porperty described in the declaration you must find for the defendants." This instruction limits the jury to the testimony referred to in said affidavit, and is therefore erroneous.

Instruction No. 41 given on behalf of appellees is erroneous in that it leaves the jury to determine what were material issues in the case. Instruction No. 42 is abstract in form and is misleading and should not have been given.

Instruction 43 given on behalf of appellees is based on

the theory that usee appellants are estopped by the statements alleged to have been made by appellant, Aldridge, as to the value of the premises in question. We do not think that the evidence in the record was of a character to warrant the giving of this instruction. This instruction directed a verdict. The court erred in giving the same.

For the reasons above set forth the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Not to be reported in full.

Term No. 25 Agenda No. 32.

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

October Term, 1921.

HORACE J. LEACH, Appellant. vs. CHARLES LEACH, Appellee.	Appeal from Circuit Court Edwards County.

Opinion by Boggs, J.

In 1903 appellant and appellee, who are brothers, organized a corporation for the purpose of carrying on a telephone business in the city of Mt. Carmel, known as the Mt. Carmel Telephone Company. Each was to furnish one-half the money and to own one-half the stock of said corporation. Neither of said parties had the funds to finance the enterprise. Appellant borrowed $1000, which he put in said business and appellee mortgaged his farm for $3000, and therefrom derived $2800, which he put into the same. Appellant then gave his note for $900 to appellee to equalize the sum they were putting into the business. Appellant turned over his stock to appellee as collateral security for said note of $900. Each party devoted his time to said business and drew therefrom about $60 per month as salary, until sometime in 1908 when appellee sold his interest in said business to appellant. After said sale, appellee virtually retired from active participation in said enterprise, although he continued to act as President of the Company, signing papers and reports from time to itme when requested by appellant. During such time, being for nearly eight years, appellant paid appellee $30 per month from the proceeds of the Company's business; paid the interest on the $3000 mortgage above referred to given by appellee and also commission, etc., for the renewal of said mortgage when it fell due.

In 1915 appellant sold the stock in said corporation to the Commercial Telephone Company and notified appellee to be present when the deal was closed. Appellee had never transferred or delivered his stock in the Company to appellant and still held appellant's shares of stock as collateral for the $900 note of appellant. In the settlement with the Commercial Telephone Company, appellant directed said Company to make $5000 of its notes (one for $3000 and one for $2000) payable directly to appellee. Thereafter appellee received payment thereof from said Commercial Telephone Company.

Appellant contends that according to the terms of sale between him and appellee, he was to pay the $3000 mortgage given by appellee and all interest thereon and the expenses of

renewals, if any, and also $2000 as profit to appellee, making a total of $5000. That the $2000 profit was to be paid in monthly installments of $30 each; said $30 to be first applied to interest accruing from time to time thereon and the balance on said principal of $2000; that he had paid in such manner the sum of $2138.87 and that he had paid the interest on and expenses incident to the renewal of, and finally the $3000 mortgage itself and that that was all that was due or owing to appellee. Appellant further contends that the $2000 note of the Commercial Telephone Company given to appellee as above set forth and which was afterwards paid to appellee belonged to appellant and was held by appellee as collateral security for the payment of said $3000 mortgage, and that appellee was liable to appellant therefor. On the other hand it is the contention of appellee that according to the terms of the sale of his stock in said Company to appellant, he was to pay him therefor $3000 and $30 per month as salary for continuing as President of said Company and was also to pay the interest and renewal charges on said $3000 mortgage. The action brought by appellant was in assumpsit and the declaration consisted of the consolidated common counts with copy of account sued on. To said declaration appellee filed a plea of the general issue. A trial was had before the court without a jury, resulting in a judgment against appellant in bar of action and for costs. To reverse said judgment appellant prosecutes this appeal.

There were no propositions of law submitted by either side and no complaint is made of the ruling of the court on the evidence, so the issues involved are issues of fact only. The only persons who testified on the trial were appellant and appellee, and so far as the record discloses each were of equal credibility. Each of said parties testified in support of the contentions made by them respectively as above set forth and their testimony was sharply conflicting. The trial court saw the parties on the stand and heard them testify and was in a much better position to judge of the weight to be given their testimony than are we. The finding and judgment of the trial court should therefore not be lightly set aside. Berghoefer v. Frazier, 150 Ill. 577.

Appellant instituted this suit and the burden of proof was on him to prove his case by preponderance of the evidence. (Broughton v. Smart, 59 Ill. 550; Singer vs. Jennison, et al., 60 Ill. 443. North Chicago St. Ry. Co. vs. Louis, 138 Ill. 9). This he failed to do and the judgment must therefore be affirmed.

Judgment Affirmed.

Not to be reported in full.

Term No. 30 Agenda No. 35

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term A. D. 1921

BERTHA DICKMAN,
Defendant in Error.

vs.

JOHN BARTON PAYNE, designated Agent, operating Toledo, St. Louis & Western Railroad,
Plaintiff in Error.

Error to Circuit Court Madison County.

Opinion by Boggs, J.

An action on the case was instituted by defendant in error, (hereafter for convenience called "plaintiff") in the Circuit Court of Madison County, to recover damages from plaintiff in error (hereafter for convenience called "defendant") for burns received by her while attempting to put out a fire which had originated on the right-of-way of the defendant and which was communicated to the pasture of plaintiff immediately adjoining said right of way. Plaintiff had for some ten or twelve years prior to the fire in question been in possession of the land in question, including the pasture where the fire occurred. She and her husband had maintained a fence around said pasture and had built sheds thereon to house their stock. A portion of said pasture had a crop of blue grass and clover growing thereon. The right of way of defendant adjoining said premises occupied by plaintiff on the northwest side thereof, had had a heavy growth of high weeds at said point which had been mowed and had been permitted to remain on the ground and a second growth of weeds and grass had come up through said mowed weeds. On the 15th day of September 1919 a fire started on said right of way and spread thereon into the pasture of plaintiff. Plaintiff and her daughter had before said time provided themselves with gunny sacks which had been attached to short sticks. When the fire in question was discovered they wet those gunny sacks and attempted to extinguish the fire by beating the same with said sacks as the evidence showed they had done on previous occasions. While so engaged, plaintiff's clothing became ignited and she was severely burned. The burns covered her back and shoulders, leg and arms. A portion of the burns on plaintiff's body were designated by said physician as "third degree burns"; that is, burns of a severity sufficient to destroy the tissue. The injuries suffered by plaintiff were of a permanent and severe character; said burns having rendered her limbs more or less stiff and the scar tissue tight and immovable.

The declaration in said cause consists of two counts. The first count charges in substance that defendant, Company, negligently suffered large quantities of dry grass and weeds to accumulate and remain upon its said right of way and adjoining the premises of plaintiff; that a spark from one of defendant's

locomotives ignited said dry grass and weeds and that a fire caused therefrom spread and was communicated to the premises of plaintiff; and that while she, the plaintiff, with due care for her own safety, was endeavoring to extinguish said fire and protect her said pasture and property, her clothing ignited and she was severely burned about her person; alleging permanent injury, ect.

The second count avers in substance that defendant through its servants negligently set fire to certain of said dry grass and weeds then on its said right of way and that said fire spread therefrom to the premises of the plaintiff and while plaintiff was endeavoring to extinguish said fire and protect her property she was badly burned, thereby suffering permanent injury, etc. To this declaration defendant filed a plea of the general issue. A trial was had resulting in verdict in favor of plaintiff for $9,500. A motion for a new trial made by defendant was overruled by the court and judgment was rendered against defendant for the amount of said verdict and costs. To reverse said judgment this writ of error is prosecuted.

It is first contended by counsel for defendant for a reversal of said judgment that the verdict is against the manifest weight of the evidence. It being the contention of defendant that there is no evidence in the record proving or tending to prove that the engine of defendant set fire to the weeds and grass on said right of way and that such proof is necessary. On the other hand counsel for plaintiff insists that while there is no direct proof that the fire on said right of way was caused by an engine of the defendant, that the facts and circumstances shown by the evidence were sufficient to warrant the jury in finding that said fire was so caused.

Katie Dickman, a daughter of plaintiff, testified on her behalf that she saw a freight train going west on defendant's road about 2:30 in the afternoon and that in about fifteen or twenty minutes thereafter she saw the fire on defendant's right of-way and that it spread therefrom to the premises of plaintiff. Other witnesses on the part of plaintiff testified with reference to seeing fire on said right of way and with reference to its spreading therefrom to plaintiff's premises. On the other hand the testimony on the part of the defendant tends to show that the fire on said right of way broke out about the noon hour of the day in question. The evidence on this issue was conflicting and it was for the jury to say what the evidence proved.

The question still remains on this phase of the case as to whether taking the evidence on the part of plaintiff's witnesses as true, the circumstances shown were sufficient to warrant the jury in finding that the fire in question was caused by one of defendant's engines.

In the case of Awe vs. C. M. & St. P. Ry. Co. 175 App. 144, the court had under consideration the question of the origin of two different fires and on page 150 the court says: "The evidence was conflicting as to the origin of this second fire * * *. The evidence shows that a heavy freight train had passed west going up hill, just a few minutes before the fire was seen and that the engine was working hard. There was evidence that the right of way was grown up with weeds and grass and was burning that afternoon, and other evidence that the right of way had been burned over two or three days before. The jury evidently believed that the right of way was in bad condition,

that it was fired by appellant's engine, that that fire escaped to appellee's adjoining field, and that appellant is responsible for the damage to appellee's pasture. The presiding judge saw the witnesses and approved the verdict of the jury. * * * We do not feel warranted in disturbing the verdict."

In L. E. & W. R. R. Co. vs. Murray 86 App. 561, the court at page 462 says: "The evidence shows that appellee owns a farm north of and adjoining the right of way of the appellant, upon which she had fences and other combustible property; that a fire started upon the right-of-way of defendant, where it joins appellee's farm, and from there communicated with the combustible material on her farm, and damaged her fences and other combustible property thereon. There was a slight conflict in the evidence as to whether or not there was any dry grass, dead weeds or other dangerous combustible material where the fire started, but the decided weight of evidence is to the effect that there was. * * * The evidence, in our opinion, fully sustains the verdict."

In I. C. R. R. Co. vs. Siler, 229 Ill. page 390, the court at page 396 says: "There was evidence tending to show that appellant had allowed dry grass and weeds to accumulate upon its right of way; that the fire started in such grass and weeds and spread to the deceased's premises immediately after the passage of a gravel train of appellant; that the deceased commenced to rake the grass and leaves on her lot and near her house, and while doing so her clothes caught fire; that the fire was started by the negligence of appellant, and that the deceased exercised ordinary care, under the circumstances for her own safety. In this condition of the record the judgment of the appellate court is final as to the facts."

It is contended by counsel for defendant that some circumstances other than the mere passing of a train must be proven. Under the decision on the Awe vs. C. N. & St. P. Ry. Co. supra and I. C. R. R. vs. Siler, supra. it would seem that the passing of a train along the right of way where dead grass and weeds had been allowed to accumulate, followed very shortly by a fire in said weeds and grass would be sufficient for the jury to find the railroad company negligent and that the fire was caused by one of its engines.

In this case evidence to the effect that dead grass and weeds had been permitted to accumulate along defendant' right of way and that same caught on fire which was communicated to plaintiff's pasture, etc. was not disputed. While there is some conflict in the evidence with reference to the circumstances surrounding the starting of the fire, we cannot say that the jury were not warranted in their finding that said fire was caused through the negligence of the defendant.

It is next contended by counsel for defendant that plaintiff was not in the exercise of due care for her own safety when she received the injuries complained of. It was her duty to preserve her property if possible, using every reasonable effort consistent with her personal safety. T. P. & W. Ry. Co. vs. Pindar, 53 Ill. 447; C. & A. Ry. Co. vs. Pennell, 94 Ill. 448; I. C. R. R. Co. vs. Siler, 229 Ill. 390.

In the latter case the court at page 393 says: "Where a person sees his property exposed to imminent danger through the negligence of another, he is justified in uisng every effort to save it which a reasonable prudent person would use under

similar circumstances, even though the effort exposes him to some danger which he would otherwise have avoided. Due care depends upon the circumstances surrounding the action. It is to be determined with reference to the situation in which he finds himself at the time. What is due care in one situation might be gross recklessness under different circumstances. Every one is bound to anticipate the results naturally following from his acts. The appellant was therefore bound to anticipate, when the fire started, that the decedent would try to put it out. This she was doing, and the allegation is that she was using all due care and caution for her own personal safety. If in so doing the fire which appellant had negligently set out spread to and ignited her clothing without any want on her part of the care which an ordinarily prudent person would exercies under the circumstances, the appellant should be held to have anticipated such result as probable and to be liable therefor."

It is next contended by counsel for defendant that the trial court errer in rejecting testimony offered by defendant with reference to the ownership of the land over which the fire burned. The declaration charged and the proof showed that plaintiff had possession of said land. The title to the land was not an issue. The trial court therefore did not err in rejecting testimony relative thereto.

Lastly, it is contended by counsel for defendant that the court erred in refusing instructions Nos. 5, 6, 7, 8, 9 and 10 offered by the defendant. Instruction No. 5 is not supported by the evidence and is misleading. The court did not err in refusing same. Instruction No. 6 is uncertain in its language, using the word "fault" in connection with the action of the plaintiff instead of the word "negligent." The court did not err in its refusal.

Instruction No. 7 offered by defendant is argumentative in its character and there is no sufficient evidence on which to base the same. There was therefore no error in refusing said instruction. Instructions eight and nine are based on the theory that the property destroyed was of no value and that the plaintiff was a mere volunteer in seeking to put out said fire. There is no evidence on which to base these instructions and the court did not err in refusing the same.

Instruction 10, being the last of defendant's refused instructions seeks to submit to the jury the question of plaintiff's mental condition. We do not think there was any evidence in the record warranting this instruction. The court, therefore, did not err in refusing to give this instruction.

No question is made by defendant with reference to the amount of the verdict. The evidence in the record seems to fully warrant the amount of the same.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

Term No. 33 Agenda No. 38

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term, A. D. 1921

J. W. WHITE, Appellant vs. UNDERWRITERS MUTUAL INSURANCE COMPANY, Appellee	Appeal from Circuit Court St. Clair Co., Ill.

Opinion by Boggs, J.

This is a suit begun by appellant in the Circuit Court of St. Clair County to recover compensation claimed to be owing to him as an Insurance Solicitor for appellee at East St. Louis. Appellant was in the employ of appellee as such solicitor from December 24, 1919 to May 31st, 1920.

The contract of employment was a verbal one entered into by appellant with appellee's Superintendent and was similar in terms to a certain written contract between appellee and one of its other insurance solicitors, named Thigpen. The Thigpen contract was admitted in evidence as plaintiff's exhibit "B" and provided among other things that "On all industrial business written under this contract and turned in to the office to which the agent is reporting, the company will pay the agent compensation as follows:

"No. 1. Seven times on an industrial increase of two dollars or less, any increase of more than two dollars being held in reserve by the company, where the amount of the weekly industrial debit of the agent is not more than twenty dollars."

"No. 2. Fifteen times on an industrial increase of one dollar or less, any increase of more than one dollar being held in reserve by the company where the amount of the weekly industrial debit of the agent is not less than $20, or more than $45.00."

"No. 3. Fifteen times on an industrial increase of one dollar and fifty cents or less, any increase of more than one dollar and fifty cents being held in reserve by the company, where the amount of the weekly industrial debit of the agent is more than $45.00."

"The agent shall not be entitled to the above times compensation unless the average per centage of collection of his weekly debit is ninety per cent for each two weeks' period."

Appellant contends that under his contract he was entitled to a collection commission of 20% which was paid and also for compensation for writing policies, which was not paid. He testified that he "wrote sixty dollars worth of policies, something over 300 policies"; that the company supplied him with a book to keep a record and that he made weekly reports to the superintendent. It appears that these weekly reports were sent

to the Chicago office of appellee and it in turn made a record thereof in a book or record called a "life register" which consisted of the name of the policy holders whose applications had been accepted, the name of the agent who wrote the policy and the cancellation or lapsed policies. This Life Register was offered in evidence as Exhibit "C" by appellant, but was rejected because not sufficiently identified. Appellant's Exhibit "A" was a statement of account between the parties hereto, dated May 31st, 1920 and showed a deficit in favor of appellee of $136.15. Said statement was signed by appellant and was admitted in evidence.

At the close of appellant's evidence, appellee requested and the trial court gave, a peremptory instruction directing the jury to find the issues for appellee.

There are five errors assigned. The most important being the rejection of appellant's Exhibit "C" and the giving of the peremptory instruction. These are the only assignments of error it will be necessary for us to consider.

Exhibit "C", the life register, was a record made by appellee at its Chicago Office from data supplied by its agents at its East St. Louis office. It was then sent to its Superintendent at East St. Louis and was used by him in the course of appellee's business in dealing with its policy holders and adjusting accounts with its agents or solicitors at East St. Louis. The Superintendent testified that he had checked the Life Register and that it was correct. While we are of the opinion that appellant's Exhibit "C" was sufficiently identified to warrant its introduction in evidence as an admission against the interest of appellee, under the following authorities: Adair vs. Adair Printing Co. 162 Ill. App. 511; McDavid vs. Ellis 78 Ill. App. 381; McClurg & Co. vs. Williams, 180 Ill. App. 699; Second Borrowers & Inv. Bldg. Assoc. vs. Cochran 103 Ill. App. 29; Bartlett vs. Board of Education 59 Ill. 369, still we are unable from an examination of said exhibit and the testimony of appellant which is very indefinite and unsatisfactory to find that appellee on the whole record is indebted to appellant. Before appellant would be entitled to a verdict in this case he must show by the evidence that appellee's indebtedness to him is in excess of $136. This amount being conceded by appellant to be owing to appellee on the statement made by him designated Appellant's Exhibit "A". Under appellant's own theory of the contract he must show a collection of 90% of each two weeks period in order to be entitled to anything in addition to his regular compensation which he concedes he has received, and this except in a few instances he has failed to do. On the whole record, we are of the opinion and so hold that the court did not err in directing a verdict for appellee.

The judgment of the trial court is therefore affirmed.

Judgment affirmed.

Not to be reported in full.

Term No. 42 Agenda No. 17

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term, A. D. 1921.

MIKE SAKACH, Appellee, vs. ARMIN WEISS AND A. R. JOHNSON, Appellants.	Appeal from ~~Circuit Court~~ City Court of Granite City.

Opinion by Boggs, J.

Appeal to City Court of Granite City

Suit was instituted by appellee against appellants before a Justice of the Peace in Madison County, for the recovery of certain funds which appellee contends appellants wrongfully deprived him of, growing out of a certain partnership transaction, had between appellee and one M. Cohn. A judgment was rendered in favor of appellee in Justice Court and on appeal to the ~~Circuit Court of said county~~ a trial was had resulting in a verdict and judgment in favor of appellee for $143.75. To reverse said judgment this appeal is prosecuted.

While other errors were assigned the only assignment of error argued by counsel representing appellants is that the verdict of the jury is against the manifest weight of the evidence.

The record discloses that appellee is a Hungarian, having lived in this country about seven years. He speaks only a few words in English and on the trial testified through an interpreter. The testimony of appellee is to the effect that on or about May 15, 1920, appellee entered into a partnership for the conducting of a soft drink parlour in Granite City, with one Morris Cohn and paid him $582. for a half interest in the business. Said business was moved to a new location and was opened up on May 15. Appellant, Armin Weiss, is a Justice of the Peace in Granite City and appeared in appellee's place of business about eight o'clock on the morning of May 15th and was introduced by appellee's partner to appellee as "My Hungarian partner." Soon thereafter appellee left his place of business to remove his personal effects to said business room. He had secured a dray for said purpose and while waiting for the same, entered a saloon and purchased a drink. While there, appellant, Weiss came in and said to him that he should not go into partnership with Cohn, that Cohn was a Roumanian Jew and was crooked, and that appellee would lose all his money. Appellee replied in effect that he was satisfied with his partnership and that if he lost his money he would blame no one but himself. Appellant, Weiss then told him that he was a Judge in Granite City, and that he could not go into partnership with Cohn without his consent and telephoned to

Appellant, Johnson, a practicing lawyer of Granite City .Johnson appeared and talked with Appellant Weiss and they together took appellee to Johnson's office and prepared a paper which they informed appellee was a warrant for Cohn, but which was in fact a contract with appellant Johnson to collect the money appellee had paid to Cohn for a stipulated fee of fifty per cent of the amount collected. After procuring said contract, Weiss and Johnson proceeded to the place of business of Cohn leaving appellee at Weiss' office. By intimating to Cohn that he might be prosecuted for keeping a house of ill fame and boot-legging, they secured from Cohn $500. of the $582. which appellee had paid for a one-half interest in said business. On their return to Weiss' office, appellants told appellee that Cohn had paid them $500 of the $582 and gave appellee a check for $250. Appellee said to them he could not see why he should not have all of his money. Appellants pomised to endeavor to get the other $82. from Cohn and would then pay Appellee all of his money. In about four days appellant, Johnson, compromised with Cohn for an additional $75. and secured for Cohn a receipt in full from appellee. Johnson then told appellee that according to the written contract, he, Johnson, was entitled to retain one-half of the $575. collected. Appellee objected to this stating that he had not employed him to do anything for him, and that he did what he did against his wishes. Appellant Johnson then said to appellee that as he did not have to go into court he would charge him but 25 per cent. Appellee again objected to this on the ground that he had not employed him. Appellant Weiss informed Appellee that the law books said that Johnson was entitled to retain that amount. Appelle then consented that Johnson should retain $143.25. Appellee related the circumstances of said payment to his friends and suit was brought a few weeks later.

On the other hand the testimony on the part of appellants is to the effect that appellee was fully cognizant of all that was going on and acquiesced therein; that he knew that appellant, Johnson was acting for him in the collecting of said funds from Cohn and that appellee signed said contract knowing the contents thereof.

No complaint was made in the oral or in the printed argument of counsel for appellants of the rulings of the court on the evidence or instructions. It was therefore a question for the jury on the facts and unless we are able to say that the verdict is against the manifest weight of the evidence we should not disturb the same. Gerdes v. Niemeyer, 193 Ill. App. 574-575. In this case we are not able to say the verdict is against manifest weight of the evidence but we are of the opinion the jury were warranted in their finding.

The claim is also made that after said collection appellant Johnson and appellee had a settlement and that appellee ratified what appellant Johnson had done and consented to permit him to retain $143.25. The facts however show that appellee's consent to his retaining this amount at that time was obtained from him by the statement of appellant, Weiss, that the law books said that Johnson could retain this amount. This would not amount to an accord and satisfaction.

The law requires of an attorney the utmost degree of fidelity towards all who employ him. Not only is the attorney

precluded from taking advantage of his superior knowledge and skill to the detriment of his client but in all controversies between attorney and client the burden is on the attorney to show that he faithfully informed his client as to all the facts and his rights in the premises. Faris v. Briscoe et al. 78 Ill. App. 242; Hill v. Montgomery 84 Ill. App 300. It was the duty of appellant Johnson to see to it that his client understood fully the business in which he was engaged. This he did not do. Appellant Armin Weiss was present during the trial of this case in the lower court but did not testify. He alone knew whether all that appellant Johnson said in English was communicated to appellee and all that appellee said in Hungarian was communicated to Johnson during these transactions. He failed, however, to take the stand and testify and failed to deny the statements attributed to him by appellee.

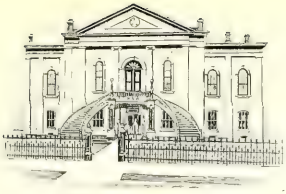
Finding no reversible error in the record the judgment of the trial court is therefore affirmed.

Judgment Affimed.

Not to be reported in full.

ROBERT B. ROE
CLERK

FRED' BRENDEL
STENOGRAPHER



JUSTICES

J. C. EAGLETON, Robinson
HARRY HIGBEE, Pittsfield
FRANKLIN H. BOGGS, Urbana

APPELLATE COURT
FOURTH DISTRICT
ILLINOIS

MT. VERNON, ILLINOIS

Corrected copy of opinion.

Term No. 42 | Agenda No. 17

Mike Sakach Appellee. vs Armin Weiss and A.R.Johnson. Appellants.	: : : : : : :	222 A. 662 Appeal from City Court of Granite City.

Term No. 42 Agenda No. 17

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term, A. D. 1921.

MIKE SAKACH, Appellee, vs. ARMIN WEISS AND A. R. JOHNSON, Appellants.	Appeal from Circuit Court Granite City.

Opinion by Boggs, J.

Suit was instituted by appellee against appellants before a Justice of the Peace in Madison County, for the recovery of certain funds which appellee contends appellants wrongfully deprived him of, growing out of a certain partnership transaction, had between appellee and one M. Cohn. A judgment was rendered in favor of appellee in Justice Court and on appeal to the Circuit Court of said county a trial was had resulting in a verdict and judgment in favor of appellee for $143.75. To reverse said judgment this appeal is prosecuted.

While other errors were assigned the only assignment of error argued by counsel representing appellants is that the verdict of the jury is against the manifest weight of the evidence.

The record discloses that appellee is a Hungarian, having lived in this country about seven years. He speaks only a few words in English and on the trial testified through an interpreter. The testimony of appellee is to the effect that on or about May 15, 1920, appellee entered into a partnership for the conducting of a soft drink parlour in Granite City, with one Morris Cohn and paid him $582. for a half interest in the business. Said business was moved to a new location and was opened up on May 15. Appellant, Armin Weiss, is a Justice of the Peace in Granite City and appeared in appellee's place of business about eight o'clock on the morning of May 15th and was introduced by appellee's partner to appellee as "My Hungarian partner." Soon thereafter appellee left his place of business to remove his personal effects to said business room. He had secured a dray for said purpose and while waiting for the same, entered a saloon and purchased a drink. While there, appellant, Weiss came in and said to him that he should not go into partnership with Cohn, that Cohn was a Roumanian Jew and was crooked, and that appellee would lose all his money. Appellee replied in effect that he was satisfied with his partnership and that if he lost his money he would blame no one but himself. Appellant, Weiss then told him that he was a Judge in Granite City, and that he could not go into partnership with Cohn without his consent and telephoned to

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On the other hand the testimony on the part of appellants is to the effect that appellee was fully cognizant of all that was going on and acquiesced therein; that he knew that appellant, Johnson was acting for him in the collecting of said funds from Cohn and that appellee signed said contract knowing the contents thereof.

No complaint was made in the oral or in the printed argument of counsel for appellants of the rulings of the court on the evidence or instructions. It was therefore a question for the jury on the facts and unless we are able to say that the verdict is against the manifest weight of the evidence we should not disturb the same. Gerdes v. Niemeyer, 193 Ill. App. 574-575. In this case we are not able to say the verdict is against manifest weight of the evidence but we are of the opinion the jury were warranted in their finding.

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precluded from taking advantage of his superior knowledge and skill to the detriment of his client but in all controversies between attorney and client the burden is on the attorney to show that he faithfully informed his client as to all the facts and his rights in the premises. Faris v. Briscoe et al. 78 Ill. App. 242; Hill v. Montgomery 84 Ill. App 300. It was the duty of appellant Johnson to see to it that his client understood fully the business in which he was engaged. This he did not do. Appellant Armin Weiss was present during the trial of this case in the lower court but did not testify. He alone knew whether all that appellant Johnson said in English was communicated to appellee and all that appellee said in Hungarian was communicated to Johnson during these transactions. He failed, however, to take the stand and testify and failed to deny the statements attributed to him by appellee.

Finding no reversible error in the record the judgment of the trial court is therefore affirmed.

Judgment Affimed.

Not to be reported in full.

Term No. 45. Agenda No. 47.

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term, A. D. 1921.

STANLEY NAVICKI,
Appellee.

vs.

THE BULL DOG AUTO FIRE INSURANCE ASSOCIATION,
Appellant.

Appeal from City Court of East St. Louis.

Opinion by BOGGS, J.

An action in assumpsit was brought by appellee against appellant to recover damages alleged to have been sustained by him by reason of his automobile being damaged in a collision on two different occasions.

The record in this case discloses that sometime prior to the accident here in question appellee had procured from appellant insurance on his automobile. This insurance covered fire, theft and collision. In each of the months of April, May and July, 1919, appellee met with an accident with his car and made a claim against appellant therefor. The claim for damages for the accident which occurred in April amounted to $71.25 and was settled by appellant before this suit was brought. The amount claimed for damages which occurred on May 14, 1919, amounted to $58.25 and the amount claimed for damages to the car which occurred on the 15th of July, 1919, amounted to $277.35. The evidence does not disclose specifically the cause of the accident in May, but the accident which occurred in July as testified to by appellee occurred while he was driving his car on the public highway. It seems the roads were muddy and that appellee met another car and that said cars came together and that appellee's car skidded. As a result thereof, the wheels were badly smashed; some of the springs were broken; and the wind-shield and top were so badly injured they had to be replaced.

The declaration filed by appellee consists of two counts. The first count is based on damages alleged to have been occasioned to appellee's automobile about the 14th day of May, 1919; the second count declares for damages alleged to have been sustained on the 15th day of July, 1919. Appellant filed the general issue and a special plea alleging payment of the claim of May 14, 1919. A trial was had resulting in a verdict for appellee for $335.80. A motion for a new trial was overruled by the trial court and judgment was entered on the verdict. To reverse said judgment this appeal is prosecuted. The assignment of errors was sufficient to include the points discussed by counsel for appellant in his brief.

At the close of appellee's evidence appellant moved the

court to exclude the evidence and to instruct the jury to find the issues for appellant on account of an alleged variance between the declaration and the proof, which said motion was denied by the Court. This ruling of the court is assigned as error. Appelant failed in said motion or in the instruction offered thereon to point out the variance relied upon. A motion to instruct the jury to find for a defendant on the ground of variance between the pleadings and the evidence is not sufficient to raise the question of variance, unless the defendant by his motion, indicate specifically in what the variance consists. This in order to enable the court to pass upon it intelligently and also to enable the plaintiff to so amend his declaration as to make it conform to the evidence. Probst Construction Co. v. Foley, 166 Ill. 31-33. Illinois Central R. R. Co. vs. Fred Behrens, 208 Ill. 20; Zellers vs. White, 208 Ill. 518-523. Tulo vs. O'Gara Coal Co., 183 App. 423-427.

In Probst Construction Co. vs. Foley, supra, the court in discussing this question at page 33 says: "At the close of planitiff's case the defendant moved the court to instruct the jury to find for the defendant, on the ground of a variance between the pleadings and evidence, and that the evidence introduced did not prove or tend to prove a cause of action against the defendant. The overruling of said motion is assigned for error. In order to raise the question of variance it was necessary for the defendant to indicate specifically the variance and point out in what it consisted, so as to enable the court to pass upon the question intelligently, and also to enable the plaintiff to so amend his pleading as to make it conform to the evidence. The defendant not having done this, but having charged a variance only in general terms the objection must be considered as waived, and the question of variance cannot be raised here. St. Clair County Benev. Society v. Fietsam, 97 Ill. 474; Lake Shore and Michigan Southern Railway Co. v. Ward, 135 id. 511; Richelieu Hotel Co. vs. Military Encampment Co. 140 id. 248; Murchie v. Peck Bros. & Co., 160 id. 175; Swift & Co. v. Madden, 165 id. 41."

In view of the foregoing authorities we hold that the court did not err in refusing to grant the motion of appellant to instruct the jury to find the issues for appellant in the trial court. It might also be observed that in our judgment there is no substantial variance between the allegations of the declaration and the proof.

It is next contended by appellant that the court erred in the giving of the two instructions given on behalf of appellee for the reason that said instructions omitted the word "if" after the word "that" in the first line of each instruction. It being argued by counsel for appellant that the failure to so insert the word "if" in effect amounted to the court saying "that the plaintiff has proven his case and that they should find the issues for plaintiff." We have examined these instructions in view of the criticism made and are of the opinion that the omission of the word "if" from each of said instructions is so palpably a clerical error that the jury could not have been misled thereby.

This court in the case of Madrey v. Meyers, 140 App. 218, in discussing a similar matter at page 219 says: "The omission of the word 'if' in the introductory part of appellee's first

given instruction does not materially affect the meaning, and was so palpably a mere clerical mistake that the jury could not have been misled by it." We hold that the giving of these two instructions on behalf of appellee was not reversible error.

It is next contended by appellant that the court erred in failing to give its refused instruction No. 2. We have examined this instruction and are of the opinion that it is substantially correct except that it leaves to the jury the question of what constitutes a material matter or issue in the case. There was no instruction in the series given that definitely pointed out to the jury what were the material facts or issues in the case. This being the state of the record there was no substantial error in refusing said instruction.

In our judgment the verdict of the jury in favor of appellee on the issues involved was amply supported by the evidence and unless serious error occurred in the ruling on the instructions, we would not be inclined to reverse the case on that account.

It is next contended by appellant that the court erred in its ruling on the evidence with reference to the cost of the repairs made on appellee's automobile occasioned by the accident which occurred on July 15th. One of the grounds of this contention is that the court allowed proof of the value of the repairs made on the car without requiring proof that the necessity of these repairs was caused by the collision in question. That objection was not made on the trial when the evidence was offered and is therfore not well taken at this time.

Another complaint is that the court allowed proof of the cost of repairs made with new material instead of second-hand material. We do not understand that when repairs are to be made on a car that has been injured in a collision or accident that these repairs are to be made from used or second-hand materials. No cases are cited by appellant in support of his contention that such should be the case. For this reason we are of the opinion there was no substantial error in the rulings on the evidence.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment Affirmed.

Not to be reported in full.

Term No. 49 Agenda No. 8

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term, A. D. 1921.

ELMER MINSON, et al.,
Appellees.

vs.

HARRY R. WILSON and WILLIAM J. WILSON,
Appellants.

Appeal from Circuit Court St. Clair County.

Opinion by Boggs, J.

Elmer Minson and twenty four others, coal miners, who had been employed by the St. Louis-Coulterville Coal Co. filed a bill in chancery to the September Term, 1917, of the circuit Court of St. Clair County, against George Hippard, R. J. Wilson, the St. Louis-Coulterville Coal Company, and appellants, Harry R. Wilson and William J. Wilson, partners doing business as Wilson Bros. for an accounting. A demurrer to the original bill having been sustained, on leave given an amended bill was filed.

Said amended bill set forth that the mine of the St. Louis-Coulterville Coal Company, which had been operated by the defendant, George Hippard, had been shut down in the summer of 1915 becaues the payrolls, due June 15th and June 30th, 1915, for $5000.00 and $3,748.87 respectively, were due and remained unpaid; that in order to resume the operation of said mine and to pay the miners the money due them, a contract was entered into on October 21, 1915, by George Hippard, party of the first part, William Wright, W. T. Heffington and Ed Holmes (representing the complainants and other miners who had been employed by said company) parties of the second part, and said coal company as party of the third part; that by the terms thereof Hippard was to operate said mine and defendant R. J. Wilson, as representative of said miners, was to have a supervisory control of same and to collect the incoming receipts and to pay operating and other expenses and the current pay rolls and royalties; that the profits beyond these expenses were to apply on back royalties and to pay the pay roll of June 30th, 1915, in proportion to the amount due each of said parties as appears in said contract; that this agreement was to continue until May 1, 1916. Said bill further alleges that said mine was carried on under said contract, but that before the date of its expiration it became apparent that the objects of the agreement could not be fully accomplished within the time specified therein, and that a second contract similar in effect was entered into by said parties on May 1, 1916, to continue for one year from that date. Said second contract consisting of fifteen paragraphs

was fully set forth in said bill. Paragraph 11 thereof is particularly involved in this suit and is as follows, to-wit:

"11. It is further agreed that the balance of said pay roll due on the 30th of June, 1915 and the balance of said back royalties shall be paid in full prior to May 1, 1917; that from the time of such payment in full of such pay roll and back royalties to the termination of this contract, any net profits that may accrue from the operations of said coal mine shall be distributed in the following manner: one-fourth of it to the party of the first part (Hippard); one-fourth to said R. J. Wilson, personally, as additional salary for his services herein; and one-half to parties of the second part (the miners), their representatives and assigns, who, at the time of the payment in full of said back pay roll and royalties, hold statements for money due them on account of said back pay roll, due June 30th, 1915, which one-half of such net profits is to be considered as interest on the amount due them on account of their failure to receive their wages when the same became due and payable."

After setting fourth said contract said bill further avers in effect that in December, 1916, each of the miners were assessed and paid from the current pay rolls $15. to meet operating expenses of said mine; that under said second contract about $80,000. was earned over and above the expenses in said agreement provided for and paid; that of this net balance one-fourth belonged to Hippard, one-fourth to R. J. Wilson and one-half to said miners. Said bill further charges that said R. J. Wilson did not so apportion said profits, but on the contrary he paid Hippard one-fourth and himself one-fourth thereof, and settled with said miners other than complainants in some manner not set forth; that by fraud, conspiracy and misrepresentation Wilson Bros. who were then conducting a store, obtained statements from some of the complainants of the amounts owing to them by said Coal Company and advanced goods thereon, saying that they would collect the wages as shown thereon and satisfy the bill for said goods as far as it reached, the over-plus, if any, to go to said miners; that if they, Wilson Bros. were unable to collect from R. J. Wilson, then the miner was to pay the store bill from other means; that Wilson Bros. collected from R. J. Wilson, under said contract, the wages owing complainants and in addition thereto as profits from said business fourteen times the amount of said wages; that upon protest of the miners that the profits had not been accounted for, Wilson Bros. refunded one-half said profits to complainants respectively and kept the other half for their commission for getting the money from R. J. Wilson and paying themselves said store bills.

That R. J. Wilson and Hippard also procured some of the statements by falsely representing that there were no profits and that the mine was running at a loss; that said R. J. Wilson and Hippard kept all profits due the miners on the statements held by them under the pretext that it would be usury for the miners to draw the one-half due them under said contract, and stating that if any noise was made about it, Hippard would claim all of said profits on said statements and the miners would get nothing above five per cent per annum as interest on the amount of said statements in addition to the principal thereof. Said bill also avers on information the amount it was claimed each complainant was entitled to and the amount he had received. Said bill prayed for an accounting and a decree that the

money alleged to have been illegally taken by said defendants be refunded to complainants, etc.

Joint and several answers were filed by R. J. Wilson and Wilson Bros. in and by which they admitted the making of the two contracts as alleged in said bill; and that each of said miners was assessed $15. but aver that within sixty days said assessment was paid by R. J. Wilson; they denied that $80,000. was earned under the second contract as profits, but admit there was a net balance of which one-fourth belonged to Hippard and one-fourth to R. J. Wilson, but deny that one-half thereof belonged to said miners for the reason it was averred that a great many of them had assigned and disposed of their interest in said statements in said contract mentioned; and further deny any fraudulent or unfair means in acquiring the same.

Appellants, Wilson Brothers aver in their said answers that said statements were obtained in good faith and for a valuable consideration namely; for goods to be received from the store operated by them and that said statements were assigned and delivered to Wilson Brothers for value and that such assignment transferred all the interest of said complainants individually in said statement to them.

The existence of a conspiracy between R. J. Wilson and appellants to defraud complainants and the other of said miners is denied in said answer. Said answer also denied that complainants were entitled to an accounting or to any relief prayed for in said amended bill of complaint. Hippard filed a cross-bill which he later amended in and by which he sought to have paragraph eleven of said second contract construed as a usurious agreement, and charged in said cross bill that said miners were entitled to nothing more than simple interest on said pay roll indebtedness.

Said cause was referred to the Master upon the pleadings for the purpose of taking proofs and for a report thereon, together with his findings on the facts, and his conclusions of law. The Master took the evidence and made a report finding the issues for the complainants in the amended bill and against appellants, Wilson Brothers and cross complainant, Hippard. The facts as found by the Master in said causes are substantially as alleged in said amended bill of complainant as hereinabove set forth, and to the effect that said miners, part of whom are complainants in the amended bill, and part of whom are intervening petitioners, continued to work in said mine under said second contract and as a result thereof, after the payment of the royalty due the Coal Company, and the payment of the current pay roll and other operating expenses, there remained on May 1, 1917, a net profit of approximately $43,225.98 and in addition thereto that there remained certain coal accounts, a part of which has since been collected.

The Master further found that shortly after May 1, 1917, and before the filing of the original bill herein on August 28th, 1917, said R. J. Wilson who had in his hands the said net profits derived from the operation of said mine, proceeded to divide the same by retaining one-fourth as his share; by paying Hippard one fourth thereof as his share and the remaining one-half he distributed in the following manner: In all cases where the miner still held his wage statement of June 30th, 1915 his share, (based on the ratio which the amount of June 30, 1915

wage statement bore to one-half of said profits), was paid direct to him. In every case where Wilson Bros. held said wage statement said pro rata share of said miners was paid to them. In the cases where Hippard held said wage statements said pro-rata shares were paid to him, and where R. J. Wilson held said wage statements, the pro rata shares were retained by him.

The master further finds that Wilson Bros. received all of the wage statements held by them, in July and August 1915, being approximately ten months before the making of the contract of May 1, 1916, which contained the provision concerning the right of the miners to share in the profits, and finds that no profit-sharing plan had been discussed at the time these wage statements were delivered to Wilson Bros. and that it was not intended by any of the holders of said statements to assign or transfer any profits accruing under said contract. Said contract at that time not being in existence; that it was the intention of the parties on each side of the transaction that the wage statements so delivered to Wilson Bros. were to be held by them as security for store accounts and with the intention that when a sufficient amount had been collected by Wilson Bros. on said wage statements to satisfy said store accounts that then any further balance collected on said wage statements should belong to said miners respectively.

The Master found specifically the amount of the dividend or profits which had accrued on each statement under said contract or agreement, the amount of the store account if any owing to Wilson Brothers by the party in whose name the statement had been issued, the amount that had been paid such party and the balance owing to him on the theory he was entitled to the full amount of profits that had accrued on said statement under said second contract after deducting therefrom said store account, if any.

The master recommended that Wilson Bros. be decreed to pay over to said master said sums for the use of said complainants respectively and that certain cash in the hands of R. J. Wilson amounting to $2241.18 and the proceeds from the sale of certain bills receivable amounting to $5097.86 should also be distributed by the Master when turned over to him in the proportion and according to the terms of paragraph eleven of said contract.

Exceptions to the master's report were overruled and said report was approved and confirmed by the court and a decree was accordingly entered against appellants Wilson Bros. From said decree this appeal is taken. Hippard and the other defendants in said proceeding not having appealed. While appellants assigned numerous error on the record, in our opinion there are only two, to which we need give attention. First, did the transaction whereby Wilson Bros. procured said wage statements constitute a sale thereof or did said transaction only amount to a pledging of said statements as security for the store accounts then owing by them and for future advancements to said miners? Second, was there an accord and satisfaction of said claims? The evidence shows without question that Wilson Bros. procured said wage statements shortly after the execution of the contract of October 21st, 1915 when the two payrolls were still unpaid and at a time when said mine was being operated under great financial difficulty and when there was no

assurance that the operation of said mine would prove successful and that the payrolls or pay statements would be paid.

The Master found ,and we think the evidence supports the finding, that Wilson Bros. took said wage statements as security for their store accounts. Practically all of the complainants who testified, testified to the effect that Harry Wilson told them that if the coal company did not pay said wage statements, they would hold said parties respectively for their sotre bills. Harry Wilson, himself while on the stand repeatedly stated in effect that he told the miners that he could not carry them without security, etc. Said statements corroborate the testimony of complainants on that point. We therefore hold that the court did not err on its finding and decree on this issue.

(2) Was there an accord and satisfaction between the complainants and Wilson Bros. of the claims for profits under said contract? In Janci vs. Cerny, 287 Ill. 359, the court at page 368 says: "The payment of a part, only, of a debt which is due and the amount of which is uncertain will not satisfy the whole debt, but where there is a dispute in good faith as to the amount due, a payment by the debtor of the amount admitted to be due, in full settlement, if accepted by the creditor, is a satisfaction of his claim " Citing Ostrander vs. Scott, 161 Ill. 339; Lapp. vs. Smith, 183 id. 179; Canton Union Coal Co. vs. Parlin & Orendorff Co. 215 id. 244; Snow vs. Griesheimer, 220 id. 106.

There must be a dispute in good faith as to the amount due before the payment of a sum less than the amount due will constitute an accord and satisfaction. Where was there such dispute in this case? R. J. Wilson paid over to Wilson Bros. a sum equal to seven times the amount of the respective wage statements of said miners held by Wilson Bros. In every instance the amount was certain and definite and was paid without question. Neither was there any question raised by the miners concerning the correctness of the store bills held by Wilson Bros. against them respectively. The only basis for a dispute came when Wilson Bros. arbitrarily declared their intention to retain 50% of the amount collected on each pay statement. This does not in law constitute a dispute in good faith 1 Corpus Juris pages 554-555. Demars vs. Land Co. 37 Minn. 418-19; Farmers Life Ass'n. vs. Cain 224 Ill. 599.

In Farmers Life Ass'n. vs. Cain, supra, the court at page 606 says: "Where there has been a compromise, in good faith, of unliquidated or disputed demands, where there is an honest difference between the parties as to the amount due, such an accord with satisfaction is binding. (Hayes vs. Mass. Life Ins. Co. 125 Ill. 626; Ostrander vs. Scott, 161 Ill. 339.) The pleadings now under consideration show no such honest difference between the parties. * * * The cases principally relied upon by appellant on this branch of the controversy are Rigdon vs. Walcott, 141 Ill. 649; Papke vs. Hammond Co. 192 id. 631; Hartley vs. Chicago and Alton Railroad Co. 214 id. 78; and Chicago City Railway Co. vs. Uhter, 212 id. 174. In the first of these cases no question of accord and satisfaction arose. The other cases were suits for personal injuries where the damages claimed were of necessity unliquidated, and it was not, and could not be, contended in either case that the release was given as evidence of the satisfaction of a liquidated claim for money due upon the payment of a smaller sum.

Such a release as was under consideration in each of those three cases, if otherwise valid, is evidence that the parties have by their own agreement liquidated the damages and that the damages so liquidated have been paid. Here the parties could not by agreement, except upon a new consideration, fix the amount due. It was already liquidated by the policy."

It is our opinion and we so hold that there was no dispute in good faith as to the amount coming to the complainants under said wage statements for profits under paragraph 11 of said contract dated May 1st, 1916. It therefore follows that there was not an accord and satisfaction of said claims.

What we have said sufficiently disposes of the questions raised by the assignments of error in this case. Finding no reversible error in the record, the decree of the trial court will be affirmed.

Decree affirmed.

Not to be reported in full.

Term No. 53 Agenda No. 2

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

March Term, A. D. 1921

LIBBIE J. NEWTON, Appellee. vs. WILLIAM H. NEWTON, Appellant.	Appeal from Circuit Court Jefferson County.

Opinion by Boggs, J.

Appellee filed a bill in the Circuit Court of Jefferson County against appellant, her husband, for separate maintenance. The record discloses that the parties hereto were married on August 13, 1919 and that their final separation occurred on November 25, 1919. Appellant was past seventy years of age and had been married twice before. By each of his former wives he had had seven children. Appellee was about fifty-three years of age and had been married once before and had three children. All of the children of both appellant and appellee were of mature years. No children were born of the marriage in question.

The record also discloses that appellant was a well-to-do farmer owning some 420 acres of land in Jefferson County where he had resided until his marriage to appellee, after which he bought property in Dahlgren and removed to the same.

The bill charges that on divers occasions appellant had been guilty of extreme and repeated cruelty toward appellee and that such conduct rendered it unsafe and improper for her to live with him; that she had left him on three different occasions prior to the final separation which occurred on November 25, 1919; that she had gone back to live with appellee on the former occasions on the strength of his promises to her to treat her as a wife should be treated, but that on each occasion on her return his conduct became more unbearable and finally became so "intolerable and unendurable" that she was compelled to leave him; the bill further charges that appellant was a man of unusually high temper; and that without the slightest cause therefor he would address toward appellee opprobious epithets and threats of personal violence, rendering it unsafe for her to live with him; that appellant at different times accused appellee of being intimate with other men and charged her with being pregnant and said that if she was in that condition he was not the father of the child. To said bill appellant filed an answer admitting the marriage and separation but denying all of the material charges made in said bill against him. A trial was had before the chancellor in open court, a finding was made in favor of appellee and a decree for separate maintenance was rendered awarding appellee alimony at the rate of $35. per month and a

solicitor's fee of $150. Counsel for appellant make no claim that the allowance of alimony and solicitor's fee, if appellee is entitled to the same, is not reasonable, so the only matter that we have before us to determine on this appeal, is as to whether the evidence in the record supports the findings and decree of the court.

Without going into a review of the testimony in detail it is only necessary for us to say that while there is no evidence in the record disclosing any acts of personal violence towards appellee, the record does disclose that appellant was extremely jealous of appellee; was high tempered and was given to making remarks and charges against appellee that to any virtuous woman would be extremely humiliating and so far as words can be said to be cruel, they partook of that character. The record discloses that appellee left appellant the first time only about three or four weeks after their marriage and that on two other occasions she left him before the final separation. On each occasion that she left, appellant strenuously urged and entreated her to return. The evidence tends to show he would take back the things he had said and in effect promised not to repeat them. On one occasion appellee and appellant were seated in their yard when a medicine man stopped. Appellee gave him a seat and went to the orchard and gathered some peaches which the medicine man, herself, and her husband ate of. Some remark was made by the medicine man with reference to some neighbors and appellee on inquiring what was the matter with him, the medicine man replied "twins." After the medicine man had gone appellant rebuked appellee for her conduct in giving a chair to the medicine man and in getting the peaches and told her that the next time anyone came she should take her place on the back porch.

On another occasion when she had left appellant for some trouble they had had, she went to St. Louis to visit a son who was a street car conductor in that city. Appellant intimated she had gone there for improper purposes, or in other words to be with some other man. Similar charges were made by appellant against appellee on other occasions.

No charge was made by appellant on the hearing that his wife was not a virtuous woman or that she had been guilty of conduct of the character which the evidence tends to show appellant had charged her of. Appellant denied in large part the testimony of appellee. However, there is evidence in the record of other witnesses tending to corroborate appellant's testimony. We are therefore of the opinion that the evidence in the record warranted the trial court in making a finding in favor of appellee and in rendering a decree for separate maintenance.

In Farnham vs. Farnham, 73 Ill. 497, the court at page 499 says: "There is nothing that inflicts so deep and cruel a wound upon a pure wife as a false accusation of want of chastity, beside which the physical injuries proved in this case are as nothing. The law has made the one a cause of divorce, but not the other. It would be a reproach to our laws if it were not permissible for a wife to abandon a husband who should continually, without just reason, reproach her with a want of virtue and fidelity to her marriage vows." This same language was used in Ward vs. Ward, 103 Ill. 483.

In Johnson vs. Johnson, 125 Ill. 510, the court at page 515 says: "But a wife who is not herself in fault is not bound

to live and cohabit with her husband if his conduct is such as to directly endanger her life, person or health, nor where the hus-husband pursues a persistent, unjustifiable and wrongful course of conduct toward her, which will necessarily and inevitably render her life miserable, and living as his wife unendurable. * * * If the husband voluntarily does that which compels his wife to leave him, or justifies her in doing so, the inference may be justly drawn that he intended to produce that result, on the familiar principle that sane men usually mean to produce those results which naturally and legitimately flow from their actions. And if he so intended, her leaving him would, in the case put, be desertion on his part, and not by the wife."

Finding no reversible error in the decree of the trial court, it will be affirmed.

Decree affirmed.

Not to be reported in full.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People, etc.,
Defendant in error,
vs.
Max Maxim, Plaintiff
in error,

Error to Lake.

DIBELL, P. J. Max Maxim was indicted in the circuit court of Lake County upon thirteen counts charging wilful sales of intoxicating liquor in the County of Lake while it was prohibition territory, with the 14th count charging the maintenance of a common nuisance by said sales. There was a plea of not guilty, a jury trial, and a verdict of guilty under every count except the 13th. A motion for a new trial was interposed and overruled, and a like motion in arrest of judgment, which was overruled. Defendant was fined $100. under each of the first six counts, and $200. under the 14th count and was sentenced to imprisonment in the county jail for thirty days under each of the first six counts, not concurrently, and for sixty days under the 14th count, and it was adjudged that the place where said liquor was sold be abated until Maxim gave bond pursuant to law. Maxim has sued out this writ of error to review the judgment.

Plaintiff in error concedes that the evidence warranted a conviction upon the counts upon which judgment was entered, but it is urged the sentence is unjust and far in excess of what was justified by the evidence in the case. The People rely upon People v. Elliott, 272 Ill. 592, as decisive that this sentence, which is less than the maximum provided by law, cannot be disturbed by this court because

The people, etc., Defendant in error, vs. Max Maxim, Plaintiff in error,	Error to Lake.

22221.A. 663

DIBBLE, P. J. Max Maxim was indicted in the circuit court of Lake County upon thirteen counts charging wilful sales of intoxicating liquor in the County of Lake while it was prohibition territory, with the 14th count charging the maintenance of a common nuisance by said sales. There was a plea of not guilty, a jury trial, and a verdict of guilty under every count except the 13th. A motion for a new trial was interposed and overruled, and a like motion in arrest of judgment, which was overruled. Defendant was fined $100. under each of the first six counts, and $200. under the 14th count and was sentenced to imprisonment in the county jail for thirty days under each of the first six counts, not concurrently, and for sixty days under the 14th count, and it was adjudged that the place where said liquor was sold be abated until Maxim gave bond pursuant to law. Maxim has sued out this writ of error to review the judgment.

Plaintiff in error concedes that the evidence warranted a conviction upon the counts upon which judgment was entered, but it is urged the sentence is unjust and far in excess of wh t was justified by the evidence in the case. The people rely upon People v. Elliott, 272 Ill. 592, as decisive that this sentence, which is less than the maximum provided by law, cannot be disturbed by this court because

of its severity. We have examined the evidence and conclude that the sentence is not unreasonably severe and we are therefore not called upon to decide whether there could be a case where the severity of the punishment would require our intervention. The provision requiring that the place of business be abated until bond is given is authorized and required by statute and Maxim can avoid that feature of the punishment by giving the bond required and abandoning the sale of liquor at that place.

The judgment is affirmed.

of its severity. We have examined the evidence and conclude that the sentence is not unreasonably severe and we are therefore not called upon to decide whether there could be a case where the severity of the punishment would require our intervention. The provision requiring that the place of business be closed until bond is given is authorized and required by statute and Hamlin can avoid that feature of the punishment by giving the bond required and abandoning the sale of liquor at that place.

The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson
Clerk of the Appellate Court.

6911

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on NOV the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Ida Martin, Administratrix, etc.,
Appellant,
vs.
Chicago, North Shore and Milwaukee Railroad,
Appellee.

Appeal from Lake.

DIBELL, P. J.

In the month of September, 1917, the Chicago, North Shore and Milwaukee Railroad operated an electric railroad from Evanston, Illinois, to Milwaukee, Wisconsin, passing through the City of Highland Park, in Lake County, where it maintained a station at Vine Avenue, which street its double-track right of way crossed by means of a viaduct. North-bound trains used the East track, and south-bound trains the West track, and on the outside of each track at Vine Avenue there was a long platform and a small shelter house for the convenience of passengers. There was no platform between the tracks nor any way for persons to cross from one platform directly to the other except by walking upon the road-bed itself. On September 26, 1917, Addison De Hart was struck by a south-bound train of said railroad while he was in the act of crossing said railroad tracks from the west platform to the east one, and was instantly killed. His administratrix brought this suit to recover damages for his death and at the trial, at the close of plaintiff's evidence, the court, on defendant's motion, instructed the jury to return a verdict for defendant. Judgment was entered on said verdict and plaintiff appeals.

Ida Martin, Administratrix,

Appellee,

vs.

Chicago, North Shore and Milwaukee Railroad,

Appellee.

Appeal from Lake.

22214.

DIBELL, P. J.

In the month of September, 1917, the Chicago, North Shore and Milwaukee Railroad operated an electric railroad from Evanston, Illinois, to Milwaukee, Wisconsin, passing through the City of Highland Park, in Lake County, where it maintained a station at Vine Avenue, which crosses the double-track right of way crossed by means of a viaduct. Northbound trains used the East track, and south-bound trains the West track, and on the outside of each track at Vine Avenue there was a long platform and a small shelter house for the convenience of passengers. There was no platform between the tracks nor any way for passengers to cross from one platform directly to the other except by walking upon the roadbed itself. On September 21, 1917, Adriana De Hart was struck by a south-bound train of said railroad while she was in the act of crossing with perfect safety from the west platform to the east one, and was instantly killed. His administratrix brought this suit to recover damages for his death and at the trial, at the close of plaintiff's evidence, the court, on defendant's motion, instructed the jury to return a verdict for defendant. Judgment was entered on said verdict and plaintiff appeals.

On the night in question the deceased, who was a soldier in the United States army, stationed at Ft.Sheridan, came upon the west platform at the Vine Avenue Station with three other soldiers. The evidence is not clear as to their purpose, but apparently they had been walking to Highland Park and had come upon the platform to take shelter from the rain. The only witness who saw them before the accident testified that there was some discussion among them during the time they were on the platform as to whether they should go to Highland Park or go back "home", by which was probably meant Ft. Sheridan. During this discussion the four took shelter at the south end of the shelter house on the west or south-bound platform. About 9:15 P.M., after these four soldiers had been on the platform a considerable space of time, an express train came from the north on the west track and a local train from the south on the east track. The express train was not scheduled to make a stop at the Vine Avenue Station, and the motorman of the north bound train shut off his headlight so as to give the motorman of the south bound train an unobstructed view of the station and to enable the south bound express train to pass through without slackening speed. The south bound express train was going about 30 miles per hour and just as it was about to pass the station the four soldiers mentioned dashed out across the west platform onto the track and were struck by the train and all were killed.

The declaration contains seven counts, of which the first, third, fourth and seventh charges that the deceased was a passenger. The second count charges that the deceased was rightfully and lawfully on the station grounds and while using due care, was struck by the train through the careless, negligent and unskillful management of the same. The fourth

On the night in question the deceased, who was a soldier in the United States army, stationed at Fort Hamilton, came upon the west platform at the Vine Avenue Station with three other soldiers. The evidence is not clear as to their purpose, but apparently they had been walking to Highland Park and had come upon the platform to take shelter from the rain. The only witness who saw that before the accident testified that there was some discussion among them during the time they were on the platform as to whether they should go to Highland Park or go back "home", by which was probably meant Ft. Hamilton. During that discussion the four took shelter at the south end of the shelter house on the west or north-bound platform. About 9:15 P.M., after these four soldiers had been on the platform a considerable space of time, an express train came from the north on the west track and a local train from the south on the east track. The express train was not scheduled to make a stop at the Vine Avenue Station, and the motorman of the north bound train shut off his headlight so as to give the motorman of the south bound train an unobstructed view of the station and to enable the south bound express train to pass through without slackening speed. The south bound express train was going about 30 miles per hour and just as it was about to pass the station the four soldiers mentioned dashed out across the west platform into the track and were struck by the train and all were killed.

The declaration contains seven counts, of which the first, third, fourth and seventh charges that the deceased was a passenger. The second count charges that the deceased was rightfully and lawfully on the station grounds and while using due care, was struck by the train through the careless, negligent and unskillful management of the same. The fourth

count charges that the deceased was on the station platform for the purpose of being transported from Vine Avenue Station to Ft. Sheridan, and that the defendant was running the train at a negligent, unlawful and illegal rate of speed. The sixth count charges that the defendant was required to bring its train to a full stop when another train on another track was receiving or discharging passengers, and that deceased, while on the station grounds for the purpose of boarding a train to be carried from Vine Avenue Station to Ft. Sheridan, was struck by an express train which was not brought to a full stop. In none of the counts of this declaration is there any allegation that the deceased was a licensee or a trespasser and that the defendant wilfully and wantonly ran him down and killed him.

In our opinion deceased was not a passenger of defendant at the time he was struck and killed. There is no evidence to show that De Hart had in his possession a ticket entitling him to ride upon a train of defendant. He was not on the proper platform from which to take passage on the north-bound train and no train was scheduled to stop at the platform on which he had been standing for a considerable time. There is some evidence in the record tending to show a difference of opinion among the four soldiers as to whether or not they should take a train at all, and also some evidence to show that they had mounted to this platform merely for the purpose of taking shelter from the rain. In this state of the evidence, we feel that the case of C. & E. I. R. R. Co. v. Jennings, 190 Ill. 478, and the cases there cited, are decisive of this point and that the question of whether or not deceased was a passenger was a question of law for the lower court, which was there correctly decided.

bound charges that the deceased was on his station platform for the purpose of being transported from Vine Avenue Station to Ft. Sheridan, and that the defendant ran-ning the train at a negligent, unlawful and illegal rate of speed. The circuit court charged that the defendant was required to bring its train to a full stop when another train on another track was receiving or discharging passen-gers, and that deceased, while on the station grounds for the purpose of boarding a train to be carried from Vine Avenue Station to Ft. Sheridan, was struck by an express train which was not brought to a full stop. In spite of the counts of this declaration is there any allegation that the deceased was a licensee or a trespasser and that the defendant wilfully and wantonly ran him down and killed him.

In our opinion deceased was not a passenger at defend-ant at the time he was struck and killed. There is no evi-dence to show that he had in his possession a ticket entitling him to ride upon a train of defendant. He was not on the proper platform from which to take passage on the north-bound train and no train was scheduled to stop at the platform on which he had been standing for a consider-able time. There is some evidence in the record tending to show a difference of opinion among the four conductors as to whether or not they should take a train at all, and also some evidence to show that they had resorted to this platform merely for the purpose of taking shelter from the rain. In this state of the evidence, it is not that the case of C. & T. I. R. Co. v. Jennings, 180 Ill. 470, and the cases therein cited, are decisive of this point and that the question of whether or not deceased was a passenger was a question of law for the lower court, which was there correctly decided.

Furthermore, the evidence is convincing, in our opinion, that deceased was guilty of such contributory negligence at the time of his death as would bar a cause of action. He was on the station platform for a considerable time before the arrival of the train which killed him. When the south-bound train approached the station, at which it was not scheduled to stop, its head-light was shining brightly. If deceased had exercised ordinary care, he could not have failed to see this approaching train before he stepped onto the track on which it was running. It is apparent that he and his companions must have started up suddenly and dashed out onto the tracks with the idea of crossing to the east platform, without looking to the north at all to ascertain if a train was approaching from that direction. Deceased was a trespasser in going upon that track on his way to the east platform when he should have descended to the street level for that purpose and, as there is neither allegation nor evidence that the defendant ran him down wilfully and wantonly, a suit based upon that ground must have failed. We hold that the trial court was justified in giving the peremptory instruction for defendant, as the evidence of the plaintiff failed to establish her case, under any count of the declaration. The judgment is therefore affirmed.

Judgment affirmed.

Furthermore, the evidence is contrary, in our opinion, that deceased was guilty of such contributory negligence at the time of his death as would act as a cause of action. He was on the station platform for a considerable time before the arrival of the train which killed him. When the south-bound train approached the station, at which it was not scheduled to stop, its head-lights was shining brightly. If deceased had exercised ordinary care, he could not have failed to see this approaching train before he stepped onto the track on which it was running. It is apparent that he and his companions must have searched up, unknowingly and heedless, out onto the tracks with the train in close proximity to the test platform, without looking to the north to see whether or not a train was approaching from that direction. Deceased was a trespasser in going upon that track on his way to the east platform when he should have descended to the lower level for that purpose and, as there is neither allegation nor evidence that the defendant was his host, virtually and wantonly, a suit based upon that ground must have failed. We hold that the trial court was justified in giving the peremptory instruction for defendant, as the evidence of the plaintiff failed to establish a prima facie, under any count of the declaration. The judgment in these cases affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on 1921 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Emma Lowe, Appellee,	)	
vs.	)	Appeal from Kankakee.
Lloyd W. Lowe, Appellant.	)	

Dibell, J.

On September 25, 1919, Emma Lowe filed a bill of complaint against her husband, Lloyd W. Lowe, for a divorce on the ground of extreme and repeated cruelty. Defendant answered, denying the cruelty. Afterwards, on motion of defendant, the issue whether defendant was guilty of extreme and repeated cruelty as charged in the bill was submitted to a jury. There was a verdict finding the issue for complainant and finding defendant guilty of extreme and repeated cruelty, as charged. A motion for a new trial was heard and denied. Thereafter evidence was heard by the court on the question of alimony, and on September 25, 1920, a decree of divorce was entered, and the decree further found that defendant was the owner of certain real estate, and alimony was awarded to complainant, payable monthly till the further order of the court, and solicitors fees were allowed to complainant, and the decree was made a lien upon the lands of defendant. Defendant prayed an appeal to this court from said decree. While the prayer and order for the appeal appear to be from the whole decree, the appeal bond only recited a decree for alimony and costs and an appeal from that order. As we understand it, the defendant is limited by the recital in his bond of that from which he appeals, (Campbell v. Jacobs, 44 Ill. App. 238,) and if so, the questions

Anna Lowe,

Appellee,

vs.

Elmer E. Lowe,

Appellant.

Appeal from Lawrence.

22216. 633

Hibben, J.:

On September 23, 1910, Anna Lowe filed a bill of complaint against her husband, Elmer E. Lowe, for a divorce on the ground of extreme and repeated cruelty. Defendant answered, denying the cruelty. Afterwards, on motion of defendant, the issue whether defendant was guilty of extreme and repeated cruelty was changed in the bill and submitted to a jury. There was a verdict finding the issues for complainant and finding defendant guilty of extreme and repeated cruelty, as charged. A motion for a new trial was heard and denied. Thereupon evidence was heard by the court on the question of alimony, and on September 25, 1910, a decree of divorce was entered, and the decree further found that defendant was the owner of certain real estate, and alimony was awarded to complainant, payable monthly till the further order of the court, and solicitors fees were allowed to complainant, and the decree was made a lien upon the lands of defendant. Defendant prayed an appeal to this court from said decree. While the proper and proper for the appeal appear to be from the whole decree, the appeal bond only recited a decree for alimony and costs and an appeal from that order. As we understand it, the defendant is limited b the recital in the bond of that from which he appeals. (Campbell v. Beecher, 44 Ill. App. 486.) and if so, the questions

of alimony and costs are the only ones presented by this record. But, as both sides have argued the merits of the divorce, we have concluded to consider that question.

The parties were married in 1887 and the final separation occurred in November, 1917. The parties have four children, three girls now of age, two of whom are married, and one son, the youngest child, not of age when this case was tried. At the time of the marriage defendant owned a small farm in Iroquois County. A few years later the parties moved to a farm in Kankakee County. There has been much trouble between the parties, and this is the third suit between them. Defendant contends that the evidence does not justify a decree for complainant. He argues that he denied the evidence of complainant as to physical violence, and that complainant was not corroborated in her evidence that she suffered physical violence from defendant, except as to matters occurring six years before the separation; that where he and the complainant were the only witnesses, the jury should not have believed the complainant, and that the matters in which she was corroborated having occurred six years before the separation, complainant by living with him during that six years condoned the offence. We do not so understand the evidence. There was evidence of numerous acts of physical violence during the last six years the parties lived together, and as we understand it, the daughters or some one or more of them, corroborated complainant's testimony in those particulars. Also, we are of the opinion that the evidence all considered the jury might reasonably believe complainant, even where there was no express corroboration of her testimony. But there was also proof of much that should be considered cruelty besides evidence of physical violence. Very many times defendant in the presence of the

of alimony and costs are the only ones presented by this record. But, as both sides have argued the merits of the alimony, we have concluded to consider that question.

The parties were married in 1885, and the final separation occurred in November, 1917. The parties have four children, three girls now of age, two of whom are married, and one son, the youngest child, not of age when this case was tried. At the time of the marriage defendant owned a farm in Iroquois County. A few years later the parties moved to a farm in Lawrence County. There has been much trouble between the parties, and this is the third suit between them. Defendant contends that the evidence does not justify a decree for complainant. He argues that he denied the evidence of complainant as to physical violence, and that complainant was not corroborated in her evidence that she suffered physical violence from defendant, except as to matters occurring six years before the separation; that where he and the complainant were the only witnesses, the jury should not have believed the complainant, and that the matters in which she was corroborated having occurred six years before the separation, complainant by living with him during that six years condoned the offense. We do not so understand the evidence. There was evidence of numerous acts of physical violence during the last six years the parties lived together, and as we understand it, the testimony of some one or more of them, corroborated complainant's testimony in those particulars. Also, we are of the opinion that the evidence all considered the jury might reasonably believe complainant, even where there was no express corroboration of her testimony. But there was also proof of such that should be considered equally besides evidence of physical violence. Very many times defendant in the presence of the

daughters called complainant a whore, a slut and a fool, with many profane words attached, and defendant does not deny this. He testifies to no fact justifying the application of these epithets to his wife in the presence of their daughters. He repeatedly said to complainant and to her daughters that he wished complainant was dead and buried under 30 feet of ground. He repeatedly said to complainant and in the presence of her daughters that if he should kill her, nobody would blame him. He scrutinized the monthly bills for household expenses and every month went into violent storms of rage over them. On one occasion he created a violent scene because he found in the monthly bill a charge for five cents worth of candy which one of the children had bought and charged without the mother's knowledge. He often raved like a madman at his wife, and on one occasion when she had gone to her brother's home on this account and he was begging her to return, he himself characterized his conduct towards her as that of a madman.

But defendant's counsel contend that these difficulties arose because complainant refused to live on the farm. The farm where they then lived was about 10½ miles from Kankakee. When the children were old enough so that the country school could not avail them further, and when the defendant had begun to be a rich man, complainant insisted that they should move into Kankakee to give the children the benefit of the schools of that city. Defendant was very much opposed to having the children educated any further. and contended that they would be happier ignorant than educated. He was opposed to having his children read books and on one occasion snatched a book from one of the daughters and tore it in two and threw it away to emphasize his contempt for knowledge and education. His wife was

daughters called complainant a whore, a slut and a fool, with many profane words attached, and defendant does not deny this. He testifies to no fact justifying the application of these epithets to his wife in the presence of their daughters. He repeatedly said to complainant and to her daughters he wished complainant was dead and buried under 30 feet of ground. He repeatedly said to complainant and in the presence of her daughters that if he should kill her, nobody would blame him. He sometimes the roughly treats her household expenses and every month runs into violent storms of rage over them. On one occasion he created a violent scene because he found in the monthly bill a charge for five cents worth of candy which one of the children had brought and charged without the mother's knowledge. He often moved like a madman at his wife, and on one occasion when she had gone to her brother's home on this account and he was begging her to return, he himself characterized his conduct towards her as that of a madman.

[illegible]

difficulties arose because complainant refused to live on the farm. The farm where they then lived was about 10½ miles from Kamloops. When the children were old enough so that the country school could not avail them further, and when the defendant had begun to be a rich man, complainant insisted that they should move into Kamloops to give the children the benefit of the schools of that city. Defendant was very much opposed to having the children educated any further, and contended that they would be simpler ignorant than educated. He was opposed to having his children read books and on one occasion snatched a book from one of the daughters and tore it in two and threw it away to emphasize his contempt for knowledge and education. His wife was

undoubtedly right, and defendant yielded and bought a home in Kankakee and the children were placed in the public school and went through the high school, and two of the daughters became teachers and the other a stenographer. Defendant spent his winters with his family in the city. As soon as the school ended in the early summer, complainant and the children went to the farm and did the housework there till school time in the fall. On at least one occasion before the schools were through complainant placed the children with her mother in town and went to the farm and did the housework there. Defendant having yielded to his wife on that subject, though ungraciously, cannot now claim that the cruelties we have alluded to were justified by his wife's insistence upon living in town in order to educate the children. After the girls were of age and married or in situations, so that they could not go to the farm with her, she testified that she did not dare to live with her husband on the farm without the presence of her daughters for her protection, and this fear of her husband seems to be justified by all the evidence.

Defendant contends that the court erred in admitting evidence of other acts of cruelty than those specifically mentioned in the bill. The bill, besides stating various acts of physical violence on specific dates, also charged that defendant had beaten, struck and kicked complainant and indulged in violent sallies of passion and used towards her very obscene, profane and abusive language many times during the last 15 years of their married life, and these general allegations permitted the proof to which objection was made. Defendant also urges that the court erred in permitting proof that appellant struck his youngest daughter and knocked her

unfortunately might, and Defendant pleaded and brought
home to Kamloops one of the children were placed in the public
school and went through the high school, and two of the daughters
were business teachers and the other a stenographer. Defendant
met again his wife with his family in the city. [illegible]
[illegible] children went to the farm and the Defendant then still
school time in the fall. On at least one occasion before
the schools were through compulsorily placed the children with
her mother in town and went to the farm and left the house-
work there. Defendant having pleaded to the wife on that
subject, though unconscionably, cannot now claim that the
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the last 15 years of their married life, and these general
allegations permitted the proof to which objection was made.
Defendant also urges that the court erred in permitting proof
that especially struck his youngest daughter and knocked her

down at a time when complainant was not present. This evidence was admissable because of what immediately follows. Defendant knocked down his daughter, Viva, on the second floor of their home in Kankakee. Complainant was engaged in some domestic work in the cellar. She heard the girl fall and immediately ran up stairs and upbraided her husband for what he had done, and he flew into a violent passion and followed her back to the cellar and there attached her and attempted to pull off her clothing, and other things there happened. Proof of knocking down of the girl was proper to an understanding of what immediately afterwards occurred between the parties.

Error is urged in the giving of certain instructions requested by complainant. We approve the giving of instruction No. 3. Instruction No. 6 seems to be supported by Farnham v. Farnham , 73 Ill. 497, and Sharpe v. Sharpe, II6 Ill. 509. Notwithstanding, we doubt whether it should have been given, but as the evidence not only justified a verdict for complainant but also would not have supported a verdict in favor of the defendant, we are of the opinion that the jury were not misled by the instruction nor defendant injured thereby. Instruction No. 8 is also supported by the authorities just cited.

Upon the question of alimony the court allowed complainant $150 per month, beginning with October 15, 1920, being the month following the decree, to be paid monthly in advance thereafter till the further order of the court. It is claimed that this is excessive. The property owned by the defendant was worth approximately $273,000 at the time of the hearing and his debts were under $10,000. Doubtless it is true that farm lands have depreciated some in value and that an actual purchaser for his city property

town at a time when one Lamont was not present. This evidence was admissible because of what immediately follows. Defendant invaded town his daughter, Viva, on the second floor of their home in Kansas. Complainant was engaged in some domestic work in the cellar. She heard the girl fall and immediately ran up stairs and upbraided her husband for what he had done, and he flew into a violent passion and followed her back to the cellar and there attacked her and attempted to pull off her clothing, and other things there happened. Proof of incendiarising down of the girl was proper to an understanding of what immediately afterwards occurred between the parties.

Error is urged in the giving of certain instructions requested by complainant. We approve the giving of instruction No. 5. Instruction No. 6 seems to be supported by Markham v. Markham, 75 Ill. 497, and Sharpe v. Sharpe, 110 Ill. 302. Notwithstanding, we doubt whether it should have been given, but as the evidence not only justified a verdict for complainant but also would not have supported a verdict in favor of the defendant, we are of the opinion that the jury were not misled by the instruction nor defendant injured thereby. Instruction No. 8 is also supported by the authorities just cited.

Upon the question of alimony the court allowed complainant $150 per month, beginning with October 15, 1900, being the month following the decree, to be paid monthly in advance thereafter till the further order of the court. It is claimed that this is excessive. The property owned by the defendant was worth approximately $273,000 at the time of the hearing and his debts were under $10,000. Doubtless it is true that farm lands have depreciated some in value and that an actual purchaser for his city property

might not be found at as high a price as the witnesses fixed. The evidence of the witnesses tended to fix his income at nearly $10,000 per year. He testified that his income was much less, but he kept no books and he evidently put his income at much less than it really is. It is sufficient to say that at a moderate estimate, he is worth between $225,000 and $250,000 and that his income exceeds $7,500. per year. It is also to be remembered that he accumulated most of his property while he and his wife were living together and that her labors contributed to the result and that she has had nothing therefor, except ~~for~~ her living. Complainant has owned a small farm for many years. For seven years defendant collected and used all the rent therefrom. Afterwards, at her insistent demand, he permitted the rent to be collected by her brother for her, but from that time on she defrayed a part of the family expenses. She now receives therfrom, after paying taxes and repairs, about $700 per year. Whenthe proofs as to alimony were heard she was 58 years old. She is not in good health and has been advised by her physician to seek another climate because of her physicial infirmities. Her youngest daughter lives with her but does not contribute to her support. Complainant testified that the income from her farm was insufficient for her support and that since she left her husband she has had employment as a practical nurse at $25 per week, when she was able to perform that service, but that she is not now able to do it. In view of the wealth and income of defendant and the fact that complainant helped him to acquire it, and in view of the ill health of complainant and lack of income, we do not feel that an allowance of $150 per month should be reversed. The court allowed $300 for her solicitor's fees for the preparation and trial of this case in the court

might not be found at as high a price as the witnesses thought.

The evidence of the witnesses tended to show that income is nearly $10,000 per year. He testified that his income was much less, but he kept no books and he evidently put his income at much less than it really is. It is sufficient to say that at a moderate estimate, he is worth between $45,000 and $50,000 and that his income exceeds $7,500. per [illegible]. It is also to be remembered that he accumulated most of his property while he and his wife were living together and that her labors contributed to the result and that she has had nothing [illegible]. [illegible]

farm for many years. For seven years defendant collected and used all the rent therefrom. Afterwards, at her instant demand, he permitted the rent to be collected by her brother for her, but from that time on she delivered a part of the family [illegible]. [illegible]

and repairs, about $700 per year. Months prior to the attorney were hired she was 38 years old. She is not in good health and has been advised by her physician to seek another climate because of her physical infirmities. Her youngest daughter lives with her but does not contribute to her support. Complainant testified that the income from her farm was insufficient for her support and that since she left her husband she has had employment as a trained nurse at $25 per week, when she was able to perform that service, but that she is not now able to do it. In view of the wealth and income of defendant and the fact that complainant helped him to acquire it, and in view of the ill health of complainant and lack of income, we do not feel that an allowance of $150 per month should be reversed. The court allowed $800 for her solicitor's fees for the preparation and trial of this case in the court

below, where she was represented by two solicitor's, not partners. This allowance was supported by the only testimony on the jubject and is approved.

The real estate of defendant was described in the evidence as a certain form, a brewery building, a garage, a barn, and the like. The final decree purported to describe these properties by their legal descriptions, without any evidence showing those descriptions correct, and it made the decree for alimony a lien upon all said real estate. That part of the decree which made it a lien upon the city real estate is reversed and remanded with directions to the court below to hear proofs as to the legal descriptions of said pieces of real estate .If the farm land is all located in Kankakee County and is still owned by the defendant, and is unincumbered, we think the decree should only be made a lien upon so much of the farm land as in the opinion of the trial court will be sufficient security for the alimony, and that the city real estate should not be subject to that lien.

The decree is therefore affirmed as to the divorce and as to the amount fixed for alimony and solicitors fees and as to making it a lien upon real estate, but is reversed as to the descriptions of the real estate and so far as it makes the alimony a lien upon the city real estate, and is remanded with directions as above.

Affirmed in part, reversed in part, and remanded with directions.

[illegible]

purchase. This allowance was supported by the only testimony on the subject and is approved.

The real estate of defendant was described in the evidence as a certain farm, a brewery building, a house, a barn, and the like. The final decree purports to describe these properties by their legal descriptions, without any evidence showing those descriptions correct, and it made the decree for alimony a lien upon all such real estate. That part of the decree which made it a lien upon the city real estate is reversed and remanded with directions to the court below to hear proofs as to the legal descriptions of such pieces of real estate. If the farm land is all located in Dakota County and is still owned by the defendant, or is unencumbered, we think the decree should only be made a lien upon so much of the farm land as in the opinion of the trial court will be sufficient security for the alimony, and that the city real estate should not be assigned to that lien.

The decree is therefore affirmed as to the divorce and as to the amount fixed for alimony and solicitors fees and as to making it a lien upon real estate, but is reversed as to the descriptions of the real estate and as to as it makes the alimony a lien upon the city real estate, and is remanded with directions as above.

Affirmed in part, reversed in part, and remanded with directions.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson
Clerk of the Appellate Court.

6917

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on 1921 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Emma Lowe, appellee,
vs.
Lloyd W. Lowe, appellant.

Appeal from Kankakee.

DIBELL, P.J. After the trial court entered the decree of divorce between these parties which is discussed in our opinion filed this day in General No. 6918, and after defendant had prayed an appeal therefrom, complainant petitioned the court for an allowance for alimony and reasonable solicitor's fees in this court pending the appeal. It was stipulated that the evidence heard in the main case on the question of alimony might be used as evidence on that hearing. The court heard further evidence and entered an order that defendant pay complainant $300 for suit money and $150 per month, beginning with the first day of January, 1921, for her support and maintenance during the pendency of the appeal. This is an appeal by defendant from that order. We are of opinion that the evidence heard in the other case justified an allowance of $150 per month for alimony during the pendency of the appeal and that $300 for suit money was justified by the evidence on that subject. Defendant expresses the fear that if the main decree is affirmed he will be required to pay alimony during the pendency of the appeal, both under the original decree and also under this order, or $300 per month. We do not think these orders as to alimony likely to be so construed, yet in order that no such construction shall be possible, it is ordered here that the present order shall be so construed that defendant shall be liable for only $150 per month of principal, as to the total alimony which defendant must be liable for during the pendency of this appeal.

Order modified and affirmed.

Emma Love, appellee;

vs.

Olova W. Love, appellant.

DIERIL, P.J. After the trial court entered the decree of divorce between these parties which is discussed in our opinion filed this day in General No. 6916, and after defendant had pursued an appeal therefrom, complainant petitioned the court for an allowance for alimony and reasonable solicitor's fees in this court pending the appeal. It was stipulated that the evidence heard in the main case on the question of alimony might be used as evidence on that hearing. The court heard further evidence and entered an order that defendant pay complainant $500 for suit money and $150 per month, beginning with the first day of January, 1921, for her support and maintenance during the pendency of the appeal. This is an appeal by defendant from that order. We are of opinion that the evidence heard in the other case justified an allowance of $150 per month for alimony during the pendency of the appeal and that $500 for suit money was justified by the evidence on that subject. Defendant expresses his fear that if the main decree is affirmed he will be required to pay alimony during the pendency of the appeal, both under the original decree and also under this order, or $300 per month. We do not think these orders as to alimony likely to be so construed, but in order that no such construction shall be possible, it is ordered here that the present order shall be so construed that defendant shall be liable for only $150 per month of principal, as to the total alimony which defendant must be liable for during the pendency of this appeal.

Order modified and affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson

Clerk of the Appellate Court.

6431

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

222 I.A. 664

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People, etc., Defendant in error, vs. George Sheldon, Plaintiff in error,	Error to County Court of Lake County.

DIBELL, P. J. The Grand Jury of Lake County returned an indictment against George Sheldon containing seventeen counts, the first sixteen of which charged him with unlawful sales of intoxicating liquor in prohibition territory, and the 17th charged him with keeping a nuisance by reason of such unlawful sales at his home. Defendant entered a plea of not guilty. The cause was certified to the County Court for trial, and it was there tried by a jury, and defendant was found guilty under counts 16 and 17. Motions for a new trial and in arrest of judgment were made by defendant, and were denied, and he was sentenced to fine and imprisonment under each of said counts 16 and 17, and under count 17 it was ordered that his dwelling house be shut up and abated by the sheriff till defendant gave bond in the penal sum of $5,000, pursuant to statute. Defendant has sued out a writ of error from this court to review said record.

Most if not all of the witnesses called by the People on that subject testified that they did not buy intoxicating liquor of defendant or at his residence. On the application of the State's Attorney, they were made the court's witnesses, and each side was permitted to cross examine them. The

The People, etc.,	
Defendant in error,	
vs.	) Error to County Court
George Sheldon, Plaintiff	of Lake County.
in error.	

DIBELL, P. J. The Grand Jury of Lake County returned an indictment against George Sheldon containing seventeen counts, the first sixteen of which charged him with unlawful sales of intoxicating liquor in prohibition territory, and the 17th charged him with keeping a nuisance by reason of such unlawful sales at his home. Defendant entered a plea of not guilty. The cause was certified to the County Court for trial, and it was there tried by a jury, and defendant was found guilty under counts 16 and 17. Motions for a new trial and in arrest of judgment were made by defendant, and were denied, and he was sentenced to fine and imprisonment under each of said counts 16 and 17, and under count 17 it was ordered that his dwelling house be shut up and sealed by the sheriff till defendant gave bond in the penal sum of $5,000, pursuant to statute. Defendant has sued out a writ of error from this court to review said record.

Most if not all of the witnesses called by the people on that subject testified that they did not buy intoxicating liquor of defendant or at his residence. On the application of the State's Attorney, they were made the court's witnesses, and each side was permitted to cross examine them. The

effort of the State was to secure from each of them the admission that he had testified before the Grand Jury that he had bought intoxicating liquor of defendant. The effort was only partially successful. ~~The~~ But such admission, when obtained, did not prove which statement was true, and there was very little testimony on that subject. The course pursued by the court was in the main correct; but as to one witness an attorney for the State told the court in the presence of the jury that the witness then being examined had testified to the contrary before the Grand Jury. Defendant objected to that statement in the presence of the jury. That objection was not ruled upon. It should have been sustained. If the attorney wished to convey that fact to the jury, he should first have been sworn as a witness. The evidence did not justify a verdict of guilty under the 17th or nuisance count. The State's Attorney argues this question as if defendant had been convicted under the first fifteen counts. The jury did not mention said counts in the verdict. This was in effect an acquittal under said counts. People v. Weill, 243 Ill. 208. The verdict is inconsistent. After acquitting defendant under the first fifteen counts, the jury could not consistently convict him of maintaining a nuisance by illegal sales of liquor at his home. A single illegal sale will not justify a conviction under the nuisance count and a closing of the home by the sheriff till a bond for $5,000. is given. It may very well be that the testimony of the witness, Murray, when all considered, would support the verdict of guilty under count 16, but that alone will not support the verdict under count 17, We do not think that the jury after dis-

effort of the State was to secure from each of them the admission that he had testified before the Grand Jury that he had bought intoxicating liquor of defendant. The effort was only partially successful. ~~The~~ But such admission, when obtained, did not prove which statement was true, and there was very little testimony on that subject. The course pursued by the court was in the main correct; but as to one witness an attorney for the State told the court in the presence of the jury that the witness then being examined had testified to the contrary before the Grand Jury. Defendant objected to that statement in the presence of the jury. That objection was not ruled upon. It should have been sustained. If the attorney wished to convey that fact to the jury, he should first have been sworn as a witness. The evidence did not justify a verdict of guilty under the IVth or nuisance count. The State's Attorney argues this question as if defendant had been convicted under the first fifteen counts. The jury did not mention said counts in the verdict. This was in effect an acquittal under said counts. People v. Weill, 243 Ill. 308. The verdict is inconsistent. After acquitting defendant under the first fifteen counts, the jury could not consistently convict him of maintaining a nuisance by illegal sales of liquor at his home. A single illegal sale will not justify a conviction under the nuisance count and a closing of the home by the sheriff till a bond for $5,000. is given. It may very well be that the testimony of the witness, Murray, when all considered, would support the verdict of guilty under count 16, but that alone will not support the verdict under count IV. We do not think that the jury after dis-

believing the evidence of illegal sales under the first fifteen counts, could upon the same evidence convict under the nuisance count. The case then is that the evidence tends to support count 16, but does not justify a conviction under count 17.

In Grom v. People, 135 Ill. App. 453, and in Gaul v. People, 136 Ill. App. 445, this court held that where an indictment or information charges separate and distinct misdemeanors in different counts, and there are convictions under several counts, a reversal may be ordered as to some counts and an affirmance as to others, contrary to the usual rule that a judgment is a unit and must all stand or fall together. If those decisions stated the law, we could affirm this judgment as to the 16th count and reverse as to the 17th count. But the case last cited was reversed by the supreme court in People v. Gaul, 233 Ill. 630, and it was there held that though the judgment of the trial court was based on different counts charging different misdemeanors, yet the judgment was so far a unit that it should either be reversed or affirmed in its entirety. As we cannot sustain the conviction under count 17, the entire judgment must be reversed and the cause remanded for a new trial under counts 16 and 17.

Reversed and remanded.

believing the evidence of illegal sales under the first fifteen counts, could upon the same evidence convict under the nuisance count. The case then is that the evidence tends to support count 16, but does not justify a conviction under count 17.

In Grom v. People, 136 Ill. App. 453, and in Gaul v. People, 186 Ill. App. 446, this court held that where an indictment or information charges separate and distinct misdemeanors in different counts, and there are convictions under several counts, a reversal may be ordered as to some counts and an affirmance as to others, contrary to the usual rule that a judgment is a unit and must all stand or fall together. If those decisions stated the law, we could affirm this judgment as to the 16th count and reverse as to the 17th count. But the case last cited was reversed by the supreme court in People v. Gaul, 238 Ill. 630, and it was there held that though the judgment of the trial court was based on different counts charging different misdemeanors, yet the judgment was so far a unit that it should either be reversed or affirmed in its entirety. As we cannot sustain the conviction under count 17, the entire judgment must be reversed and the cause remanded for a new trial under counts 16 and 17.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

951 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Cora Court, appellee,
vs.
Peoria Railway Company,
appellant.

Appeal from Peoria.

222 I.A. 664

DIBELL, P. J. Mrs. Court was injured in a collision between an automobile in which she was riding, and a street car operated by the Peoria Railway Company, and she sued said company to recover damages for said injuries and filed a declaration in which she charged in various counts that defendant so negligently and carelessly and improperly drove and operated said car that by reason thereof she was injured; that defendant failed to keep a lookout for automobiles, as was its duty, and by reason thereof she was injured; that said defendant drove said street car at a high and dangerous rate of speed and thereby she was injured; that defendant failed to sound a gong, beginning 100 feet from Richmond Avenue and to keep the same ringing till Richmond Avenue was reached by said car as required by an ordinance in force there, and because of said omission plaintiff was injured. Defendant pleaded the general issue and there was a jury trial and a verdict for plaintiff for $750., and a motion by defendant for a new trial, which was refused. Plaintiff had judgment on the verdict and defendant prosecutes this appeal.

North Elizabeth Street, called also Elizabeth Street is a north and south street and is 60 or 65 feet wide between the curbs, and appellant operated a single street car line in the center thereof, over which cars passed both ways with switches at convenient places. West Richmond Avenue, called also Richmond Street, began at North Elizabeth Street and ran west. Something like 75 feet north of Richmond Street, Gale Avenue began at Elizabeth Street and ran in a northwest-

Case Cont. ...

vs.

Peoria Railway Company.

Appeal from Peoria.

DIBELL, P. J. Mrs. Court was injured in a collision between an automobile in which she was riding, and a street car operated by the Peoria Railway Company, and she sued and got judgment to recover damages for such injuries, and lifted a judgment in which she charged in various counts that defendant negligently and carelessly, and improperly drove and operated said car that by reason thereof she was injured; that defendant failed to keep a lookout for automobiles, as was its duty, and by reason thereof she was injured; that said car was drove and moved car at a high and improper rate of speed and thereby she was injured; that defendant failed to sound a gong, beginning 100 feet from Fourteenth Avenue and continuing the same ringing till Richmond Avenue, as required by law, as required by an ordinance in force there, and because of said omission plaintiff was injured. Defendant pleaded the general issue and there was a jury trial which resulted for plaintiff for $750., and a motion by defendant for a new trial, which was refused. Plaintiff has judgment on the verdict and defendant prosecutes this appeal.

North Elizabeth Street, which also Richmond Avenue in the curve, and approaches operated a single street car line in the center thereof, over which cars passed both ways and switches at convenient places. West Richmond Avenue, called also Richmond Street, began at North Elizabeth Street and ran west. Something like 75 feet north of Richmond Street, Lake Avenue began at Elizabeth Street and ran in a northwest-

erly direction. W. S. Winget was a real estate agent and drove Mrs. Court west on Richmond Street from Elizabeth Street to show her some houses he had for sale, she being a prospective purchaser. He sat on the left hand side in front driving. She sat on the rear seat on the right hand side and her daughter on the left. Winget drove them back east on Richmond Street to Elizabeth Street and turned north. A street car was going north on Elizabeth Street. From a consideration of the evidence we are satisfied that the collision did not occur on Richmond Street but that Winget drove north on the west side of Richmond Street and passed beyond Richmond Street and about half way to Gale Avenue and then suddenly turned easterly across the track directly in front of the street car and was there struck by the car. We are of opinion that the ordinance requiring the gong to be sounded as the car approached Richmond Street was for the benefit of those being on Richmond Street, and that since Winget had driven off of Richmond Street and north thereof, the jury could not reasonably find that the failure to sound the gong before reaching Richmond Street was the cause of the injury. The proof shows the street car was not driven at a high and dangerous rate of speed and that the collision was not caused by any failure of the motorman driving the car to keep a look out. The motorman saw the automobile traveling west of the street car track and had no reason to suppose that Winget would suddenly turn and drive across the track. In our opinion the jury were not warranted in finding that defendant was guilty of any of the negligence charged in the declaration. Chicago Union Traction Co. v. Leach, 215 Ill. 184.

As Winget drove east on Richmond Street and during the

only direction. M. F. Winget was a young man [illegible] drove Mr. Court west on Richmond Street from Elizabeth Street to allow her some hours in her [illegible], who being a prospective purchaser. He sat on the left hand side in front driving. She sat on the rear seat on the right hand side and her daughter on the left. Winget drove that back seat on Richmond Street to Elizabeth Street and turned north. A house was not going north of Elizabeth Street. From a consideration of the evidence we are satisfied that the collision did not occur on Richmond Street but that Winget drove north on the west side of Richmond Street and passed beyond Richmond Street and about half way to Duke Avenue and then suddenly turned southerly across the street directly in front of the street car and was there struck by the car. We are of opinion that the ordinance requiring the gong to be sounded on the car approached Richmond Street was for the benefit of those being on Richmond Street, and that since Winget had driven off of Richmond Street and north thereon, the jury could not reasonably find that the failure to sound the gong before reaching Richmond Street was the cause of the injury. The proof shows the street car was not driven at a high and dangerous rate of speed and that the collision was not caused by any failure of the motorman driving the car to keep a look out. The motorman saw the automobile approaching west of his street car through and had no reason to suppose that Winget would suddenly turn and drive across the track. In our opinion the jury were not warranted in finding that defendant was guilty of any of the negligence charged in the declaration. Chicago Union Traction Co. v. Leach, 215 Ill. 188.

As Winget drove west on Richmond Street and turning in

last block before he reached Elizabeth Street he was driving at a high rate of speed. Mrs. Court first sued him for the injuries she received in this collision, and on the trial of that case she fixed Winget's speed during that last block at 40 miles per hour. The jury might well have found that negligence on his part caused the collision but that negligence was not attributable to Mrs. Court. But Mrs. Court though alarmed at the speed and compelled to hang onto the frame of the car to steady herself, took no steps to cause him to slow down or to object to the speed at which he was driving. Under Flynn v. Chi. City Ry. Co., 250 Ill. 460, and the many cases there reviewed, we are of opinion she was guilty of contributory negligence which would bar her recovery. The judgment is therefore reversed.

(Finding of facts to be incorporated in the judgment. We find from the evidence that defendant was not guilty of the negligence charged in any count of the declaration; that the acts and omissions of defendant's servant in charge of the street car in question did not cause the injury to plaintiff; that plaintiff was guilty of negligence which contributed to her injury; and that plaintiff has no cause of action against defendant.)

last block before he reached Tidewater Street he was driving at a high rate of speed. Mrs. Court didn't look for the impending the received in this collision, and on the trial of that case she stated Mager's speed during that last block at 40 miles per hour. The jury might well have found that negligence on the part caused the collision but that negligence was not attributable to Mrs. Court. But Mrs. Court though warned of the speed was impelled to hang onto the frame of the car to steady herself, took no steps to cause him to slow down or to object to the route at which he was driving. Orman Tyson v. Chi. City Ry. Co., 280 Ill. 480, and the many cases there reviewed, we are of opinion she was guilty of contributory negligence which would bar her recovery. The judgment of the trial court (Finding of facts to be incorporated in the judgment. We find from the evidence that Gaskell was not guilty of the negligence charged in the count of the declaration; that the note and admissions of defendant's counsel in charge of the street car in question did not cause the injury to plaintiff; that plaintiff was guilty of negligence which contributed to her injury; and that plaintiff has no cause of action against defendant.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Dorothy Grimm,
Appellee,
vs.
Henry Grimm,
Appellant.

Appeal from Kane.

Dibell, P.J.

This is an appeal from Henry Grimm from an order entered January 29, 1921, in the circuit court of Kane County, finding him guilty of contempt of court in failing to pay alimony to his former wife, Dorothy Grimm, under a final decree entered in November, 1919, commanding him to pay her alimony in the sum of $50 per month and committing him to jail till he paid her $225.00, which the court found him in arrears, or until released by due process of law.

Dorothy Grimm filed her bill of complant against Henry Grimm on April 30, 1919, wherein she chagged that she had been a resident of the State of Illinois for more than ten years last past; that she was lawfully married to Henry Grimm on January 3, 1912, and lived with him till January 27, 1919, and that he had been an habitual drunkard for more than two years and had ill-treated his family, and that they had one child, then aged six years, etc., and she therefore asked a divorce and alimony and stated what the earnings of her husband were. Henry Grimm answered the bill, admitting that the parties were lawfully married on January 3, 1912, but he denied the charges of habitual drunkenness and ill-treatment of his family. There was a hearing on November 25, 1919, and a decree which found that complainant and defendant were lawfully married January 3, 1912

Dorothy Grimm,

Libellant,

vs.

Henry Grimm,

Defendant.

Appeal from Kane.

Dibell, P. J.

This is an appeal from Henry Grimm from an order entered January 29, 1921, in the circuit court of Kane County, finding him guilty of contempt of court in failing to pay alimony to his former wife, Dorothy Grimm, under a final decree entered in November, 1919, commanding him to pay her alimony in the sum of $30 per month and committing him to jail till he paid her $285.00, which the court found him in arrears, or until released by due process of law.

Dorothy Grimm filed her bill of complaint against Henry Grimm on April 30, 1919, wherein she charged that she had been a resident of the State of Illinois for more than ten years last past; that she was lawfully married to Henry Grimm on January 3, 1912, and lived with him till January 27, 1919, and that he had been an habitual drunkard for more than two years and had ill-treated his family; and that they had one child, then aged six years, etc., and she therefore sought a divorce and alimony and stated what the earnings of her husband were. Henry Grimm answered the bill, admitting that the parties were lawfully married on January 3, 1912, but he denied the charges of habitual drunkenness and ill-treatment of his family. There was a hearing on November 25, 1919, and a decree which found that complainant and defendant were lawfully married January 3, 1912

and found the defendant guilty of the charge of habitual drunkenness and that he was unfit to have charge of the child, and the decree granted a divorce and awarded the custody of the child to the mother, and found that defendant was able to pay for the support of the child, and adjudged that he pay $50.00 per month, beginning on December I, I9I9, till the further order of the court. On May 24, I920, Mrs. Grimm filed a petition, setting up his default in payments under said decree, and the court ordered Henry Grimm to be cited to show cause why he should not be punished for contempt. To that petition he filed an answer in which he set up that he was formerly married to one Martha Klier in Illinois on February 4, I908, and that afterwards in a suit for divorce brought by him against that wife, he obtained a decree of divorce from her on May 30, I9II, and that his marriage to the present complainant, Dorothy Fuller, now Grimm, on January 3, I9I2, was less than one year after the granting of said divorce from Martha Klier, and therefore, under the statutes of Illinois, said marriage between himself and Dorothy Fuller was unlawful and void and the court had no jurisdiction to grant such divorce or to allow alimony and that therefore his failure to pay alimony did not constitute contempt of court.

Upon this state of the case appellant contends that illegality cannot be waived, and that the court will refuse to enforce a decree based upon a violation of the statute, and that upon discovering that the court has been defrauded it will leave the parties where it finds them; and that if a decree of divorce is void, that is a complete defense to a charge of contempt such as this. Appellee contends that a decree rendered by a court having jurisdiction of the parties

and found the defendant guilty of the charge of habitual drunkenness and that he was unfit to have charge of the child, and the decree granted a divorce and awarded the custody of the child to the mother, and found that defendant was able to pay for the support of the child, and adjudged that he pay $20.00 per month, beginning on December 1, 1919, till the further order of the court. On May 24, 1920, Mrs. Grimm filed a petition, setting up his default in payments under said decree, and the court ordered Henry Grimm to be cited to show cause why he should not be punished for contempt. To that petition he filed an answer in which he set up that he was formerly married to one Martha Miller in Illinois on February 4, 1908, and that subsequent to a suit for divorce brought by him against that wife, he obtained a decree of divorce from her on May 30, 1911, and that his marriage to the present complainant, Dorothy Miller, now Grimm, on January 3, 1912, was less than one year after the granting of said divorce from Martha Miller, and therefore, under the statutes of Illinois, said marriage between himself and Dorothy Miller was unlawful and void and the court had no jurisdiction to grant such divorce or to allow alimony and that therefore his failure to pay alimony did not constitute contempt of court.

Upon this state of the case appellant contends that illegality cannot be waived, and that the court will refuse to enforce a decree based upon a violation of the statute, and that upon discovering that the court has been deceived it will leave the parties where it finds them; and that if a decree of divorce is void, that is a complete defense to a charge of contempt such as this. Appellee contends that a decree rendered by a court having jurisdiction of the parties

and the subject matter is not open to contradiction there after between the same parties, unless reversed or annulled in some proper proceeding, and that a party who has with knowledge of the facts assumed a particular position in judicial proceedings is thereafter estopped to assume another position inconsistent therewith; and that in such a case a party can not refuse to obey a decree previously entered by a court having jurisdiction of the parties and the subject matter. In the application of these rules appellee contends that as the bill of complaint and defendant's answer alleged a valid marriage on January 3, 1912, and as the decree rendered in November, 1919 found that the same was a valid marriage which decree was never reversed, defendant cannot now at a later term of court dispute that which he admitted by his answer and which the court found by its decree.

The parties seem to have overlooked one matter. Although the statute here drawn in question provides that neither party to a divorce shall marry again within one year from the time the decree was granted, still we think that statute must mean, in legal effect, provided each party remains living during said year. We are the opinion that the statute does not mean that if one of the parties died after the divorce and during the year, the other party was still debarred from marrying after such death within one year after the divorce. At the hearing of the contempt proceeding appellant testified that his first wife, Martha Klier Grimm, is dead, but he did not state when she died. In order to make the provisions of said statute a defense in this proceeding to collect alimony, it was essential that said Martha Klier Grimm was living when the second marriage to Dorothy Fuller Grimm was entered upon. As Martha Klier Grimm

is dead and the date of her death is not shown we must assume in support of the decree of divorce here in question that she was dead before defendant's marriage to Dorothy Fuller on January 3, 1912. A defense to the enforcement of the decree for alimony has therefore not been established.

This record does not require us to decide what conclusion should be reached if the proof had shown that Martha Klier Grimm was alive when the parties to this suit were married.

The order is therefore affirmed.

is dead and the date of her death is not shown we must assume in support of the decree of divorce here in question that she was dead before defendant's marriage to Dorothy Miller on January 5, 1924. A defense to the enforcement of the decree for alimony has therefore not been established.

This record does not require us to decide what consideration should be received if the proof had shown that Martha Miller Graham was alive when the parties to this marriage.

The order is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson

Clerk of the Appellate Court.

6963

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

222 I.A. 664

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People, etc., Defendant in error, vs. John Niemi, Plaintiff in error.	)	Error to Lake.

222 I.A. 664

DIBELL, P. J. John Niemi was indicted in the circuit court of Lake County for violations of Section 127 of the Criminal Code. The indictment contained twenty-one counts. He was convicted under the first four counts. Each count charged that in a certain building occupied by him he knowingly and unlawfully permitted persons to come together to play for money at a game, contrary to the statute. The first count also charged a former conviction for the same offense. Motions for a new trial and in arrest of judgment were overruled, and defendant was fined $500. under the first count and $100 under each of the second, third and fourth counts, and to imprisonment in the county jail for six months, and to pay the costs. Defendant has sued out this writ of error to review the judgment.

It is contended that as the verdict did not specially find the fact of the former conviction, defendant is acquitted of that part of the charge in the first count, and therefore the sentence under the first count is beyond that warranted by the statute. The verdict was: "We the jury find the defendant guilty in manner and form as charged in counts numbered 1, 2, 3, 4, of the indictment." The former conviction was proved, and not

The People, etc., Defendant in error. vs. John Miami, Plaintiff in error.	Error to Lake.

22214. 664

DIBBLE, P. J. John Miami was indicted in the circuit court of Lake County for violations of Section 127 of the Criminal Code. The indictment contained twenty-one counts. He was convicted under the first four counts. Each count charged that in a certain building occupied by him he knowingly and unlawfully permitted persons to come together to play for money at a game, contrary to the statute. The first count also charged a former conviction for the same offense. Motions for a new trial and in arrest of judgment were overruled, and defendant was fined $500. under the first count and $100 under each of the second, third and fourth counts, and to imprisonment in the county jail for six months, and to pay the costs. Defendant has sued out this writ of error to review the judgment.

It is contended that as the verdict did not specially find the fact of the former conviction, defendant is acquitted of that part of the charge in the first count, and therefore the sentence under the first count is beyond that warranted by the statute. The verdict was: "We the jury find the defendant guilty in manner and form as charged in counts numbered 1, 2, 3, 4, of the indictment." The former conviction was proved, and not

denied by any proof. We are of opinion that finding defendant "guilty in manner and form as charged" in the first count is equivalent to finding that there was a former conviction as charged in that count as well as guilty of unlawfully permitting persons to come together in a place occupied by him to play for money at a game. Lakomy v. People, (Colo.) 173 Pac. 571.

It is contended that the verdict is not supported by competent evidence proving defendant guilty beyond a reasonable doubt. We have considered the evidence, and are of opinion that it warranted the verdict. Indeed, the testimony of defendant in his own behalf practically proved the case against him, except as to the former conviction. The bill of exceptions shows that the former indictment was in evidence, but does not set it out. The evidence for the people also warranted the conviction. Complaint is also made of the rulings and language of the court, and of remarks by the State's attorney, during the trial. We find no serious error in them. The jury could not reasonably have found defendant not guilty.

Complaint is made of the refusal of instructions requested by defendant. Some of them were repetitions of legal propositions given in other instructions requested by defendant. Others assumed that defendant was on trial on the charge of keeping a gaming house. That was not the charge. All said instructions were properly refused.

It is strenuously insisted that defendant did not have a fair trial. Some of the witnesses were foreigners. Some had difficulty in understanding the questions. Some spoke through an interpreter. Some were obviously in

denied by any proof. We are of opinion that finding defendant "guilty in manner and form as charged" in the first count is equivalent to finding that there was a former conviction as charged in that count as well as guilty of unlawfully permitting persons to come together in a place occupied by him to play for money at a game. Lakomy v. People, (Colo.) 178 Pac. 871.

It is contended that the verdict is not supported by competent evidence proving defendant guilty beyond a reasonable doubt. We have considered the evidence, and are of opinion that it warranted the verdict. Indeed, the testimony of defendant in his own behalf practically proved the case against him, except as to the former conviction. The bill of exceptions shows that the former indictment was in evidence, but does not set it out. The evidence for the people also warranted the conviction. Complaint is also made of the rulings and language of the court, and of remarks by the State's attorney, during the trial. We find no serious error in them. The jury could not reasonably have found defendant not guilty.

Complaint is made of the refusal of instructions requested by defendant. Some of them were repetitions of legal propositions given in other instructions requested by defendant. Others assumed that defendant was on trial on the charge of keeping a gaming house. That was not the charge. All said instructions were properly refused.

It is strenuously insisted that defendant did not have a fair trial. Some of the witnesses were foreigners. Some had difficulty in understanding the questions. Some spoke through an interpreter. Some were obviously in

sympathy with defendant. All the testimony tended to show the guilt of the defendant. The sentence imposed was the least the law permitted upon a conviction for a second offense.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson
Clerk of the Appellate Court.

6921

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6929. Agenda No. 32

Nora O'Brien, Appellant,	)	
vs.	)	Appeal from Knox County.
John Waggener, Appellee.	)	

Jones, J.

This is a suit brought by the appellant against the appellee because of injuries to herself and her automobile occasioned by a collision between the automobile driven by her and an automobile driven by the appellee on a public highway in the village of Wataga. The evidence shows that the appellant and her niece were driving north on a highway within the corporate limits of the village but outside of the platted portion where there were no houses for a considerable distance on either side. Shortly before the accident while driving on the east side of the road appellant met Wayne Parkinson in a car who passed her upon the west side of the road. The dust arose from the cars in a great cloud and because there was little or no wind, it hung about the road making vision almost impossible. John Waggener, the appellee, had been in company with Parkinson at the latter's home and had started down the road about the same time. He was traveling on the east side of the road and appellant claims she also was traveling on that side. Because of the dust, neither of the parties saw the other in time to avoid the collision which seriously damaged appellant's car and inflicted personal injuries upon her and her niece. Appellant and her niece were taken to a hospital where their wounds were treated.

Immediately after the accident a number of people gathered about the wrecked cars and appellant made a

This is a suit brought by the appellant against the appellee because of injuries to herself and her automobile occasioned by a collision between the automobile driven by her and an automobile driven by the appellee on a public highway in the village of Wabash. The evidence shows that the appellant and her niece were driving north on a highway within the corporate limits of the village but outside of the platted portion where there were no houses for a considerable distance on either side. Shortly before the accident while driving on the east side of the road appellant met Wayne Henderson in a car who passed her upon the west side of the road. The dust arose from the cars in a great cloud and because there was little or no wind, it hung about the road making vision almost impossible. John Waggoner, the appellee, had been in company with Henderson at the latter's home and had started down the road about the same time. He was travelling on the east side of the road and appellant claims she also was travelling on that side. Because of the dust, neither of the parties saw the other in time to avoid the collision which resulted damaged appellant's car and inflicted personal injuries upon her and her niece. Appellant and her niece were taken to a hospital where their wounds were treated.

Immediately after the accident a number of people gathered about the wrecked cars and appellant was s

statement to several of them to the effect that the boys, meaning appellee and those with him, were not to blame. Afterwards while she was at the hospital being treated for her injuries she was called upon by appellee's father, some other of his relatives and a lady friend. These callers testified to a conversation with the appellant in which she stated that she had been driving on the west side of the road to keep out of the dust but just before the accident had crossed to the east side and in so doing ran into appellee's car. There are different claims as to the rate of speed of appellee's car.

The evidence on the part of appellant as disclosed by the abstract tends strongly to show that she was driving north at a low rate of speed on the east side of the road about five feet from the ditch, in a position where she had a right to be; that the appellee was driving south on the same side of the road at a very high rate of speed and because of the dust was unable to see the appellant approaching him and therefore ran into her and that because of the character of the ground at that point she was unable to turn to the right sufficiently to avoid the collision, even if she had been aware of appellee's approach. While the appellee testified that he was not going at a high rate of speed, he admitted that after striking appellant's car, his car moved forward about two feet toward the south. Appellant's car was five hundred pounds heavier than appellee's car. If the two cars were going at the same rate of speed appellant's car would have undoubtedly driven appellee's car backward. The fact that appellant's car was driven back is a strong circumstance tending to show that appellee's car was being driven at the greater speed. The right side of each car overlapped the right side of the other car from fifteen to

statement to several of them to the effect that the boys, returning appellee and those with him, were not to blame. Intoxicants while she was at the hospital being treated for her injuries she was called upon by appellee's father, one other of his relatives and a lady friend. There evidence tended to a conversation with the appellant in which she stated that she had been driving on the west side of the road to keep out of the dust but just before the accident had removed to the east side and in so doing ran into appellee's car. There are different claims as to the rate of speed of appellant's car.

The evidence on the part of appellant as disclosed by the statutory tends strongly to show that she was driving north at a low rate of speed on the east side of the road about five feet from the ditch, in a position where she had a right to be; that the appellee was driving south on the same side of the road at a very high rate of speed and because of the dust was unable to see the appellant approaching him and therefore ran into her car and that because of the character of the ground at that point she was unable to turn to the right sufficiently to avoid the collision, even if she had been aware of appellee's approach. While the appellee testified that he was not going at a high rate of speed, he admitted that after striking appellant's car, his car moved forward about two feet toward the north. Appellant's car was five hundred pounds heavier than appellee's car. If the two cars were going at the same rate of speed appellant's car would have unfortunately driven appellee's car backward. The fact that appellant's car was driven back is a strong circumstance tending to show that appellee's car was being driven at the greater speed. The right side of each car overlapped the right side of the other car from fifteen to

twenty inches. Because of this appellant's car would be pushed sidewise in a position diagonally across the road from south-west to north-east.

The testimony of the appellee and Arthur Sullivan, who was riding with him was that the appellant approached appellee's car from the south-west; that they were traveling about six or eight miles an hour; that they could only see about a rod ahead because of the dust. Sadie Lemley and William Lemley who lived about half a block south of where the collision occurred saw the appellant pass their home. They stated that she was going north on the east side pf the road about four feet from the ditch at a low rate of speed.

It is therefore apparent that there was a decided conflict in the evidence with respect to whether appellee was guilty of negligence and whether appellant was guilty of contributory negligence.

We think instruction number eleven is clearly erroneous. It told the jury that even though they believed the defendant was driving his car at a speed not over thirty miles an hour they should not consider such rate of speed to have been excessive unless they found from the greater weight of the evidence that the speed at which the defendant was driving was greater than was reasonable and proper having regard to the traffic and the use of the highway or such as might reasonably be expected to endanger the life or limb or injure the property of any ~~of~~ person using the said highway. This is not the law. The statute in force at the time of the accident provides that if the rate of speed of any motor vehicle outside the closely built up business portions and resident portions within any incorporated city, town or village exceeds twenty miles per hour such rate of speed shall be prima facie evidence of speed greater than is reasonable and proper having regard for the traffic and use of

twenty inches. Because of this appellant's car would be just driving in a position diagonally across the road from south-west to north-east.

The testimony of the appellee and Thomas Williams, who was riding with him was that the appellant approached appellee's car from the south-west; that they were travelling at six or eight miles an hour; that they could only see ahead a certain distance because of the curve. Bessie Lemley and Willis Lemley who lived about half a block south of where the collision occurred saw the appellant pass their home. They testified that he was going north on the east side of the road about two feet from the ditch at a low rate of speed.

It is therefore apparent that where two equally balanced conflicts in the evidence with respect to whether appellee was guilty of negligence and whether appellant was guilty of contributory negligence.

We think instruction number three is clearly erroneous. It tells the jury that even though they believed the defendant was driving his car at a speed not in excess of twenty miles an hour they should not consider such rate of speed to have been excessive unless they found from the greater weight of the evidence that the speed at which the defendant was driving was greater than was reasonable and proper having regard to the traffic and the use of the highway or such as might reasonably be expected to endanger the life or limb or injure the property of persons using the said highway. This is not the law. The statute in force at the time of the accident provides that if the rate of speed of any motor vehicle outside the corporate limits in business portions and resident portions within any incorporated city, town or village exceeds twenty miles per hour such rate

the way. If the proof showed that the defendant was driving at a rate of speed of thirty miles an hour then the appellant was not bound to show by the greater weight of the evidence that such speed was greater than was reasonable and proper. The burden of proving that it was reasonable and proper under the circumstances was then upon the appellee. This instruction must have been very prejudicial to appellant's interests. However, appellant did not assign as grounds of her motion for a new trial the giving of this instruction and of course can not be heard to complain of the giving of it at this time.

Appellant asked the court to give two instructions as to the measure of damages. These instructions were refused by the court. However, the court gave instructions numbered three and five requested by the appellant which together stated the true measure of damages. Instruction number five omitted to state that the expense of treatment for appellant's injuries was an element of damages to be considered. Such expenses were proven. Since the verdict is for the defendant this error was not of great importance.

The court gave for the defendant instruction number fifteen to the effect that if the jury believed that the view of the approaching cars was obstructed by dust and that the plaintiff neglected and failed to sound a horn or other alarm to give notice of her approach and that such failure to give warning was negligence in the operation of her car and by reason of such negligence if the same was shown by the evidence the cars driven by the defendant and plaintiff collided, then the jury should find the defendant not guilty. We do not believe that the law imposes any duty upon the driver of a car who is in a place in the road where he has a right to be to sound a horn or give other notice or signal whenever his view

the way. If the proof showed that the defendant was driving at a rate of speed of thirty miles an hour when the appellant was not bound to show by the greater weight of the evidence that such speed was greater than was reasonable and proper. The burden of proving that it was reasonable and proper under the circumstances was then upon the appellee. This instruction must have been very prejudicial to appellant's interest.

However, appellant did not assign as grounds of her motion for a new trial the giving of this instruction and of course can not be heard to complain of the giving of it at this time.

Appellant asked the court to give two instructions as to the measure of damages. These instructions were refused by the court. However, the court gave instructions numbered three and five requested by the appellant which together stated the true measure of damages. Instruction number five omitted to state that the expense of treatment for appellant's injuries was an element of damages to be considered. Such expenses were proven. Since the verdict is for the defendant this error was not of great importance.

The court gave for the defendant instruction number fifteen to the effect that if the jury believed that the view of the approaching cars was obstructed by dust and that the plaintiff neglected and failed to round a turn or other place to give notice of her approach and that such failure to give warning was negligence in the operation of her car and by reason of such negligence in the same was shown by the evidence the cars driven by the defendant and plaintiff collided, then the jury should find the defendant not guilty. We do not believe that the law imposes any duty upon the driver of a car who is in a place in the road where he has a right to be to sound a horn or give other notice or signal whenever his view

is obstructed because of dust arising from a passing car yet the jury might so find under this instruction. Inasmuch as the evidence shows that no such signal was given the jury may have concluded that there was no alternative under the law as given them by the court but to find the defendant not guilty.

While the question as to what constitutes negligence is usually one of fact for the jury and instructions of similiar import with the one here complained of, have been approved in reference to the duty of a person about to cross a rail-road track, Chicago City R. Ry. Co. vs. O'Donnell 208 Ill. 267; Carlin vs. Grand Trunk Ry. Co. 243 Ill. 64, still we think such an instruction when applied to persons using vehicles upon the same highway is calculated to mislead the jury by inducing in their minds the belief that the law imposes duty upon those operating a motor vehicle to sound a horn or give some signal whenever their vision is obscured by dust. There is evidence in the record tending to show that appellant was on the right side of the road and so close to the east side of it that she could not have turned far enough to the right to have avoided the accident. If the jury credited such evidence the rights of the plaintiff were undouttedly seriously prejudiced by the instruction telling them to find against her if they believed she "neglected" to sound a horn. The instruction virtually tells the jury that the failure to give a signal was negligence on her part.

We think the evidence in this case entitled the plaintiff to a trial free from error which might and probably did materially contribute to the verdict against her.

The cause is therefore reversed and remanded.

is observed because of fact entitling the [illegible] to [illegible] the jury might find under this instruction. [illegible] so the evidence shows that no such signal was given the [illegible] have concluded that there was no alternative under the law as given them by the court but to find the defendant negligently.

While the question as to what constitutes negligence is usually one of fact for the jury and instructions of similar import with the one here complained of, have been approved in reference to the duty of a person about to cross a rail-road track, Chicago City R. Co. v. [illegible] 207 Ill. [illegible]; [illegible] we think such an instruction when applied to persons riding vehicles upon the same highway is calculated to mislead the jury by inducing in their minds the belief that the law imposes duty upon those operating a motor vehicle to sound a horn or give some signal whenever their vision is obscured by dust. There is evidence in the record tending to show that appellant was on the right side of the road and so close to the east side of it that she could not have turned far enough to the right to have avoided the accident. If the jury credited such evidence the rights of the plaintiff were unfortunately prejudiced by the instruction telling them to find against her if they believed she "neglected" to sound a horn. The instruction virtually tells the jury that the failure to give a signal was negligence on her part.

We think the evidence in this case entitled the plaintiff to a trial free from error which might and probably did materially contribute to the verdict against her.

The cause in the trial court reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson

Clerk of the Appellate Court.

6913

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6913. Agenda No. 18.

William L. Hulsizer, Appellant,	)	
vs.	)	Appeal from the Circuit Court
David E. Almgreen, Appellee.	)	of Stark County.

222 I.A. 665

Partlow, J.

Appellant, William L. Hulsizer, began an action of assumpsit in the circuit court of Stark County against appellee, David J. Almgreen, to recover a commission for the sale of real estate. There was a trial by jury, verdict for appellee, and an appeal from the judgment rendered upon the verdict.

The first error urged is that the verdict was contrary to the law and the evidence. Appellee was the owner of 198½ acres of land in Knox county, Illinois, and in the spring of 1919 it was placed in the hands of E. A. Beadle, of Kewanee, for sale. Afterwards on July 23, 1919, it was placed in the hands of appellant for sale at $300.00 per acre, the commission to be two per cent. It was further agreed that appellant might sell it for less than $300.00 per acre if the purchaser was a man who would make a good neighbor, but appellant was to first consult appellee before such a sale was made. On the same day that the land was placed in his hands appellant went to see Thomas Fell, who afterwards became the purchaser. Fell had eighty acres of land which he was trying to sell. Appellant asked Fell what he was going

vs.

David E. Jameson,

Appeal from the Circuit Court of Union County.

Fortlow, J.

Appellant, William L. Fulkerson, began an action of assumpsit in the circuit court of Union county against appellee, David J. Jameson, to recover a commission for the sale of real estate. There was a trial by jury, verdict for appellee, and an appeal from the judgment rendered upon the verdict.

The first error urged is that the verdict was contrary to the law and the evidence. Appellee was the owner of 198½ acres of land in Union county, Illinois, and in the spring of 1910 it was placed in the hands of L. Mueller, of Lowsmee, for sale. Afterwards on July 25, 1910, it was placed in the hands of appellant for sale at $200.00 per acre, the commission to be two per cent. It was understood that appellant might sell it for less than $200.00 per acre if the purchaser was a man who would make a good neighbor, but appellant was to first consult appellee before such a sale was made. On the same day that the land was placed in his hands appellant went to see Thomas Hall, who subsequently became the purchaser. Hall had eighty acres of land which he was trying to sell. Appellant asked Hall what he was going

to do about selling his eighty acres and Fell replied that he had listed it for sale. Appellant told Fell that he thought he had a piece for sale that would suit Fell better, it was a better location and had new improvements, and appellant asked Fell to promise that he would look at it in case Fell sold his own land. Fell replied that he would not promise, but if he happened to be out there and came around that way he would look at it on his own account. Appellant testified that Fell said that if he did so he, Fell, would tell appellee that appellant sent him to look at the land. The next day appellant took Alvin Vansickle to look at Fell's land, but upon their arrival found that Fell had sold his land. Appellant then took Vansickle to look at appellee's land. Appellant introduced Vansickle to appellee who was just starting to Kewanee, and appellee told Vansickle to look the place over which Vansickle did, but after so doing Vansickle decided not to buy.

A day or two later Fell and wife were in the hotel of George W. Gibbs in Lafayette, Illinois, and Gibbs told Fell about the land of appellee being for sale. Fell and wife went to look at appellee's land. Fell testified that he told appellee that appellant had told him that the land was for sale and that Fell knew that appellant was the agent for it, also that he, Fell, had talked with Gibbs about it, Appellee testified that Fell came to see his place on July 28, 1919, and after talking with Fell, appellee went to the telephone and called appellant and asked appellant if he had any dealings on the farm, if he had anybody on the string, and appellant replied that he had not, that he had brought Vansickle out to look at the land but Vansickle did not want to buy. Appellee testified that he said to appellant "Is everything clear?" and appellant replied

to do about selling his eighty acres and Hall replied that he had listed it for sale. Appellant told Hall that he thought he had a place for sale that would suit Hall better, it was a better location and had new improvements, and appellant asked Hall to promise that he would look at it in case Hall sold his own land. Hall replied that he would not promise, but if he happened to be out there and came around that way he would look at it on his own account. Appellant testified that Hall said that if he did so he, Hall, would tell appellee that appellant sent him to look at the land. The next day appellant took Alvin Vamsiolie to look at Hall's land, but upon their arrival found that Hall had sold his land. Appellant then took Vamsiolie to look at appellee's land. Appellant introduced Vamsiolie to appellee who was just returning to Newmore, and appellee told Vamsiolie to look the place over which Vamsiolie did, but after so doing Vamsiolie decided not to buy.

A day or two later Hall and wife were in the hotel of George M. Gibbs in Ledgerette, Minnesota, and Gibbs told Hall about the land of appellee being for sale. Hall and wife went to look at appellee's land. Hall testified that he told appellee that appellant had told him that the land was for sale and that Hall knew that appellant was the agent for it, also that he, Hall, had talked with Gibbs about it. Appellee testified that Hall came to see his place on July 8, 1919, and after talking with Hall, appellee went to the telephone and called appellant and asked appellant if he had any dealings on the farm, if he had anybody on the farming, and appellant replied that he had not, that he had brought Vamsiolie out to look at the land but Vamsiolie did not want to buy. Appellee testified that he said to appellant "Is everything clear?" and appellant replied

"Yes, as far as I know." Appellant's version of this telephone conversation is that appellee called appellant on the telephone and asked appellant whether Vansickle was going to do anything and appellant replied that the place did not suit Vansickle and that he would not buy it.

On July 29, 1919, appellee's land was sold to Fell for $275.00 per acre. Some days after the conveyance appellant, appellee and Fell met on the streets of Toulon and had a conversation. Appellant's version of this conversation is that he said to Fell "Didn't you promise me that you would look at the farm through me if you sold your farm?" and Fell replied that he got appellee's farm through appellant and nobody else. Appellee's version of this conversation is that Fell said "You old fool, don't you come on to Dave for any commission. You are not entitled to any. You don't need the money. If it was yours he (appellee) would give it to you right away," and appellant replied "that he ought to have some kind of a settlement out of it."

Appellee testified that on October 7, 1919, he had a conversation with appellant in which appellant first said that he did not have any conversation with appellee over the telephone the day Fell looked at the farm, or that he did not remember any such conversation, but that later in the conversation appellant admitted that he did remember having such a conversation. Frank Shockley corroborates appellee as to this conversation of October 7, 1919. Asa White testified that he had a conversation with appellant in which appellant said he ought to have something out of the sale, but when White asked him if he had anything to do with selling the place appellant replied that he did not. Fell testified that he had no dealings with appellant with reference to the sale,

"Yes, as far as I know." Appellant's version of this telephone conversation is that appellee called appellant on the telephone and asked appellant whether Vanatoffe was going to do anything and appellant replied that the place did not suit Vanatoffe and that he would not buy it.

On July 29, 1918, appellee's land was sold to Nell for $276.00 per acre. Some days after the conversaeee appellant, appellee and Nell met on the streets of Norton and [illegible]

[illegible]

is that he said to Nell "Didn't you promise me that you would look at the farm through me if you sold your county" and Nell replied that he got appellee's farm through appellant and nobody else. Appellee's version of this conversation is that Nell said "You old fool, don't you come on me. I'm not in commission. You are not entitled to any. You don't need the money. If it was yours he (appellee) would give it to you right away," and appellant replied "what do you mean to have some kind of a settlement out of it."

Appellee testified that on October 7, 1918, he had a conversation with appellant in which appellant stated said that he did not have any conversation with appellee from the telephone the day Nell looks at the farm, or that he did not remember any such conversation, but that later in the conversation appellant admitted that he did remember having such a conversation. Frank Shoemaker corroborates appellee as to this conversation on October 7, 1918. He also testified that he had a conversation with appellant in which appellant said he ought to have something out of the sale, and then Nate asked him if he had anything to do with selling the place appellant replied that he did not. Nell testified that he had no dealings with appellant with reference to the sale of

but that his talk with Gibbs caused him to look at the place.

There may be some other facts in evidence which have some bearing on the question at issue in this case, but what we have above recited are the principal facts.

this evidence amply shows that the land was placed in appellant's hands for sale. He was the first person who called Fell's attention to this property. Fell went to see the land and informed appellee that appellant had told him that the land was on the market. Appellee called appellant on the phone and a conversation took place between them concerning a purchaser. Just exactly what was said in this conversation is in conflict, but it does appear from this conversation that Fell's name was not mentioned by either party, although Fell at the exact moment of that conversation was in appellee's house and was talking to him about buying this farm and had told appellee that appellant was the first one who had informed him that the farm was for sale.

The law required good faith on the part of appellee in dealing with his agent. It was not necessary in order to entitle the agent to commission that the agent should sell the land provided he is the procuring cause. Regelin vs. Lathgren, 207 Ill. App. 409. The agent might recover, though his principal ignored the fact that the sale was solicited by the agent. It was a question of fact for the jury to determine from the evidence whether the appellant was the procuring cause of the sale. As the judgment will have to be reversed for errors in instructions, we refrain from passing upon the weight of the evidence, but we deem it proper to say that the evidence was close and the appellant had the right to have the jury properly instructed as to the law applicable to the facts presented.

but that his talk with Gibbs caused him to look at the place.

There may be some other facts in evidence which have some bearing on the question at issue in this case, but what we have above recited are the principal facts.

This evidence amply shows that the land was placed in appellant's hands for sale. He was the first person who called Hall's attention to this property. Hall went to see the land and informed appellee that appellant had told him that the land was on the market. Appellee called appellant on the phone and a conversation took place between them concerning a purchaser. Just exactly what was said in this conversation is in conflict, but it does appear from this conversation that Hall's name was not mentioned by either party, although Hall at the exact moment of that conversation was in appellee's house and was talking to him about buying this farm and had told appellee that appellant was the first one who had informed him that the farm was for sale.

The law required good faith on the part of appellee in dealing with his agent. It was not necessary in order to entitle the agent to commission that the agent should sell the land provided he is the procuring cause. Hogelin vs. Lathgren, 207 Ill. App. 409. The agent might recover, though his principal ignored the fact that the sale was solicited by the agent. It was a question of fact for the jury to determine from the evidence whether the appellant was the procuring cause of the sale. As the judgment will have to be reversed for errors in instructions, we refrain from passing upon the weight of the evidence, but we deem it proper to say that the evidence was close and the appellant had the right to have the jury properly instructed as to the law applicable to the facts presented.

The court instructed the jury that though they might believe from the evidence that appellant told Fell that appellee's farm was for sale, and that as a result of such information Fell purchased said farm, yet if they further believed that before selling said farm to Fell appellee called appellant on the telephone and asked him if he had done anything toward selling the farm or procuring a buyer, and that appellant told appellee that he had not and had not showed it to anyone and had no buyer in view, and that appellee believed and relied on such information and by reason of such information sold the farm at the reduced price, then in such a state of the proof appellant could not recover and the jury should find for the appellee.

The jury was also instructed that if they believed from the evidence that appellee asked appellant if he had a customer and appellant refused to disclose to his principal that he had a customer when requested, and told appellee he had no customer, and relying upon this information appellee reduced the price of the farm the amount of the commission or more, the jury should find for the appellee even if they believed Fell was a customer produced by appellant.

Appellant objects to these instructions on the ground that they ignore the question of good faith, and that they are not supported by the evidence, that there is nothing to show how much appellee reduced the price.

A party claiming the benefit of estoppel must have acted in good faith. Washingtonian Home of Chicago vs. City of Chicago, 157 Ill. 414. There can be no estoppel if the party claiming the benefit thereof knew the facts represented were untrue. Supreme Tent Knights of Maccabees vs. Stansland, 206 Ill. 124. If both parties are equally cognizant of the

The court instructed the jury that though they might believe from the evidence that appellant told [illegible] appellee's farm was for sale, and that as a result of that information Bell purchased said farm, yet if they further believed that before selling said farm to Bell appellee called appellant's [illegible] this [illegible] appellant [illegible] [illegible] off its farm at the reduced price, then in such a case the appellant could not recover and the jury should find for the appellee.

[illegible]

Appellant objects to these instructions on the ground that they ignore the question of good faith, and that they are not supported by the evidence, that there is nothing to show that much appellee reduced the price.

A party claiming the benefit of estoppel must have acted in good faith. [illegible] vs. City of Chicago, 157 Ill. 417. There can be no estoppel if [illegible] claiming the benefit [illegible] [illegible]

facts there can be no estoppel. Galpin vs. City of Chicago, 269 Ill. 27.

Each of these instructions directed a verdict. When an instruction directs a verdict it must contain all of the elements necessary to entitle the party to the verdict which is directed. These instructions entirely omit the element of good faith. Appellee under the evidence knew that appellant had done something towards selling the farm or procuting a purchaser. In fact he knew that appellant had talked to Fell about buying the farm and that Fell had called to look at the farm. Appellee could not in good faith have believed and relied upon the information which the instructions state he received from appellant for the reason that he had positive information which was contrary to the facts recited in the instructions. He could not rely on information which he knew was untrue. Neither instruction is based on the evidence. There is no evidence that appellant in the telephone conversation told appellee that appellant had not showed the farm to anyone or that appellant refused in that conversation to disclose his customer, nor is there any evidence that the price of the farm was reduced the amount of the commission or more on account of the information which appellee received from appellant. These instructions may announce correct propositions of law when they are supported by the evidence in the case, but they are not based upon the evidence in this case and should not have been given and they constituted reversible error.

Complaint is made that the court improperly refused to permit counsel for appellant to cross-examine appellee with reference to the contents of a sworn plea filed by appellee which plea appellant claims was contrary to appellee's testimony on the trial concerning the telephone conversation. The estoppel claimed by appellee is based almost entirely

upon this conversation over the telephone. If appellee made statements in a sworn plea relative to the conversation contrary to his testimony upon the trial appellant had a right to cross-examine him relative thereto and the court was in error in not permitting it to be done.

For the errors indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

upon this conversation over the telephone. [illegible]
made statements in a sworn plea relative to the [illegible]
contrary to his testimony, was the total [illegible]
to cause-[illegible] him relative thereto and the [illegible]
in not permitting it to be done.

For the errors indicated the judgment will be
reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson
Clerk of the Appellate Court.

6916

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6916 Agenda 21

Louis C. Carr and Frank W. Williams Appellees, vs. Lizzie Butterworth, John Felch and Alice M. Schlaff, Appellants,	Appeal from the Circuit Court of Winnebago County.

Partlow, J.

This was an action of assumpsit in the circuit court of Winnebago county, by appellees, Louis C. Carr and Frank W. Williams, real estate brokers, against appellants, Lizzie Butterworth, John Felch and Alice M. Schlaff, to recover a commission for the sale of real estate.

There have been two trials. On the first trial a jury was waived and evidence, oral and documentary, was submitted to the trial court, whereupon judgment was rendered in favor of the present appellants and against appellees in bar of the action. Upon appeal to this court, the judgment was reversed and the cause remanded, 219 Ill. App. 14, where the facts are fully stated and the points presented determined. The second trial was upon a stipulation, waiving a jury and agreeing that the evidence taken in the original case should again be submitted to the trial court, whereupon judgment was rendered in favor of the appellees and against the appellants for $1904.37. To review that judgment this appeal was prosecuted.

There are three assignment of errors, first in admitting incompetent and improper evidence, second, in refusing each proposition of law submitted by appellants, and third in

Louis C. Carr and Frank W. Williams Appellees, vs. Maude Butterworth, John Telon and Alice M. Schlaff, Appellants.	Appeal from the Circuit Court of Winnebago County.

Jackson, J.:

This was an action of assumpsit in the circuit court of Winnebago county, by appellees, Louis C. Carr and Frank W. Williams, real estate brokers, against appellants, Maude Butterworth, John Telon and Alice M. Schlaff, to recover a commission for the sale of real estate.

There have been two trials. On the first trial a jury was waived and evidence, oral and documentary, was submitted to the trial court, whereupon judgment was rendered in favor of the present appellants and against appellees in bar of the action. Upon appeal to this court, the judgment was reversed and the cause remanded, 216 Ill. App. 11, where the facts are fully stated and the points presented determined. The second trial was upon a stipulation, waiving a jury and agreeing that the evidence taken in the original case should again be submitted to the trial court, whereupon judgment was rendered in favor of the appellees and against the appellants for $1904.37. To review that judgment this appeal was prosecuted.

There are three assignment of errors, first in admitting incompetent and improper evidence, second, in refusing the proposition of law submitted by appellants, and third in

entering judgment which was contrary to the law and the evidence.

The evidence shows that a written contract was entered into for the sale of real estate. Two copies of that contract were executed. One copy was signed by all three of the appellants and by Keating, the purchaser, and the other was signed by Keating and Lizzie Butterworth. The copy signed by all of the parties was filed for record in the recorder's office of Winnebago county. It was contended that there had been certain alterations in one of the copies and that the writings are merely option contracts and not contracts of sale.

Upon the former appeal we fully considered the question as to the legal effect of these written instruments, and after a consideration of many authorities, on page 25, we said: "Applying the rules deduced from these authorities, we are of the opinion that neither the writing signed by Keating as it appears upon the records of the recorder of deeds of Winnebago county nor the writing as claimed by appellees is an option but each of them is an agreement for sale. The writing as claimed by the appellees (now appellants) had none of the distinguishing characteristics of an option, but all of its terms and provisions were those of a contract of sale. It is headed 'Articles of Agreement for warranty deed with forfeiture'. By its terms Keating unqualifiedly agrees to pay for the property in question and appellees (now appellants) agreed to sell and convey it to him when the payments are made. It is mutual, and by its terms is made binding upon the heirs, executors and administrators and assigns of both parties. It provides for damages for a breach of contract by either party and

entering judgment which was contrary to the law and the evidence.

The evidence shows that a written contract was entered into for the sale of real estate. Two copies of that contract were executed. One copy was signed by all three of the appellants and by Keeting, the purchaser, and the other was signed by Keeting and Diana Butterworth. The copy signed by all of the parties was filed for record in the recorder's office of Winnebago county. It was contended that there had been certain alterations in one of the copies and that the writings are merely option contracts and not contracts of sale.

Upon the former appeal we fully considered the question as to the legal effect of these written instruments, and after a consideration of many authorities, on page 29, we said: "Applying the rules deduced from these authorities, we are of the opinion that neither the writing signed by Keeting as it appears upon the records of the recorder of deeds of Winnebago county nor the writing as claimed by appellees is an option but each of them is an agreement for sale. The writing as claimed by the appellees (nor appellants) had none of the distinguishing characteristics of an option, but all of its terms and provisions were those of a contract of sale. It is headed 'Articles of Agreement for warranty deed with forfeiture'. By its terms Keeting unqualifiedly agrees to pay for the property in question and appellees (nom appellants) agreed to sell and convey it to him when the payments are made. It is mutual, and by its terms is made binding upon the heirs, executors and administrators and assigns of both parties. It provides for damages for a breach of contract by either party and

provides different measures of damages for breaches of the contract by either of the parties."

It is also urged by appellees that the appellants did not furnish a purchaser who was able, ready and willing to buy and there is no evidence to show that Keating, the purchaser, was able to complete the purchase. On page 27 we said: "We find from the undisputed facts in the case that appellees (now appellants) listed their property with appellants (now appellees) for sale; that appellants (now appellees) produced a prospective purchaser who was acceptable to appellees (now appellants) and with whom, without fraud on the part of appellants (now appellees) appellees (now appellants) entered into a valid, binding and enforceable contract and that therefore appellants (now appellees) were entitled to their commission, amounting to $1650.00."

What we said upon the former appeal with reference to the legal effect of the written instrument offered in evidence in this case and whether the appellees furnished a purchaser who was ready, willing and able to buy was based upon the identical evidence now before us. If there had been any new evidence offered, or any change in the evidence upon the second trial, there might be ground for re-arguing these questions. We have again examined all of the errors assigned under the first and third assignments of error and are satisfied with the conclusions reached upon the former appeal.

Two propositions of law were submitted to the trial court as follows: 1. The court holds as a matter of law that under the terms of the contract in evidence in this case, marked "Defendants' Exhibit A" if Edward E. Keating failed to pay more than the sum of $300.00 on said contract, then said contract terminated by its terms and Keating was not bound as a matter of law to further perform under said contract.

contract by either of the parties."

It is also urged by appellees that the appellants is not Yarnish a purchaser who was able, ready and willing to buy and there is no evidence to show that Keeling, the purchaser, was able to complete the purchase. On page 21 we said: "We find from the undisputed facts in the case that appellees (now appellants) listed their property with appellants (now appellees) for sale; that appellants (now appellees) produced a prospective purchaser who was ready, able to appellees (now appellants) and with whom, without fraud on the part of appellants (now appellees) appellees (now appellants) entered into a valid, binding and enforceable contract and that therefore appellants (now appellees) were entitled to their commission, amounting to $1550.00."

What we said upon the former appeal with reference to the legal effect of the written instrument offered in evidence in this case and whether the appellees furnished a purchaser who was ready, willing and able to buy was based upon the identical evidence now before us. If there has been any new evidence offered, or any change in the evidence upon the second trial, there might be ground for re-arguing these questions. We here again examined all of the errors assigned under the first and third assignments of error and are satisfied with the conclusions reached upon the former appeal.

Two propositions of law were submitted to the trial court as follows: 1. The court holds as a matter of law that under the terms of the contract in evidence in this case, marked "Defendants' Exhibit ..." in Number 1. Keeling failed to pay more than the sum of $550.00 on said contract, then said contract terminated by its terms and Keeling was not bound as a matter of law to further perform under said contract.

2. The court holds as a matter of law that the contract offered in evidence in this case, marked "Defendants' Exhibit A" constitutes an option to purchase and not a contract of sale. Both of these propositions were properly refused by thecourt under the former decision of this court and under the law and evidence in this case.

We find no reversible error and the judgment of the circuit court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson

Clerk of the Appellate Court.

6923

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on 1921 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

C.C. & J.W. Johnson, Appellants, vs. Mark A. Root, Executor of the last will and testament of Phebe A. Root, Deceased, and Mark A. Root, Appellees.	Appeal from Circuit Court of Whiteside County.

Partlow, J.

Appellants, C.C. & J.W. Johnson, filed their petition in the circuit court of Whiteside county for an attorney's lien, against Mark A. Root, as executor of the last will and testament of Phebe A. Root, deceased. The court dismissed the petition and this appeal was prosecuted.

The record shows that Mark A. Root, executor of the last will and testament of Phebe A. Root, deceased, who was her brother and only heir at law, filed his bill in the circuit court of Whiteside county to the October Term, 1920, against the First Church of Christ, Scientist, of Morrison Illinois, and other beneficiaries, to defeat the fifth clause of the will of Phebe A. Root, deceased, which clause gave, devised and bequeathed all of the residue and remainder of the estate, both real and personal, to the First Church of Christ, Scientist, of Morrison, Illinois, to be used exclusively for the erection of a church building for said First Church, to be constructed of stone or manufactured stone, on the ground that after the will was made, the First Church of Christ, Scientist, erected a church building in Morrison in substantially the form prescribed by the will, and the testatrix contributed $500.00 toward the same, and that by reason thereof the legacy

O.O. & J.W. Johnson,

Appellants,

vs.

Mark A. Root, Executor of the last will and testament of Phebe A. Root, Deceased, and Mark A. Root,

Appellees.

of Whiteside County.

Hartlow, J.

Appellants, O.O. & J.W. Johnson, filed their petition in the circuit court of Whiteside county for an attorney's lien, against Mark A. Root, as executor of the last will and testament of Phebe A. Root, deceased. The court dismissed the petition and this appeal was prosecuted.

The record shows that Mark A. Root, executor of the last will and testament of Phebe A. Root, deceased, who was her brother and only heir at law, filed his bill in the circuit court of Whiteside county to the October term, 1920, against the First Church of Christ, Scientist, of Morrison Illinois, and other beneficiaries, to defeat the ninth clause of the will of Phebe A. Root, deceased, which clause gave devised and bequeathed all of the residue and remainder of the estate, both real and personal, to the First Church of Christ, Scientist, of Morrison, Illinois, to be used exclusively for the erection of a church building for said First Church, to be constructed of stone or manufactured stone, on the ground that after the will was made, the First Church of Christ, Scientist, erected a church building in Morrison in substantially the form prescribed by the will, and the testatrix contributed $500.00 toward the same, and that by reason thereof the legacy

and gift in the fifth clause had been addemed and had lapsed and the remainder of the estate had become intestate property and by law passed to Mark A. Root the only heir at law.

The petition of appellants alleged that on October I, I9I9, appellants were employed by the board of directors on the First Church of Christ, Scientist, of Morrison, as attorneys, to advise and protect the interests of said church under said will; that they advised their clients as to their rights and interests under the will and filed an answer to the bill filed by the executor and heir at law. That on October I, I920, the board of directors notified appellants that they had elected to terminate the services of appellants in the case pending and requested appellants to withdraw the answer filed by appellants to the bill; that appellants refused to withdraw the answer and refused to withdraw from the case and a written notice of such refusal was served by them upon the board of directors; that no order submitting another solicitor was filed in the case; that appellants were paid nothing for the services rendered; that they had no express contract for fees and they had reason to believe that their clients would refuse to pay them any fees whatever for the services rendered and that they were entitled to the usual and customery fee; that on January I5, I92I, they served on appellees a notice in writing claiming a lien and interest in the cause of action and in the money in the hands of appellees belonging to or which might be found due the church because of the services rendered in obtaining the property so bequeathed and devised to them by the decedent.

The motion to dismiss was upon the ground that no claim, demand or cause of action was shown by the

and gift in the fifth clause had been defeated and had lapsed and the remainder of the estate had become intestate property and by law passed to Mark A. Root the only heir at law.

The petition of appellants alleged that on October 1, 1919, appellants were employed by the board of directors on the First Church of Christ, Scientist, of Morrison, as attorneys, to advise and protect the interests of said church under said will; that they advised their clients as to their rights and interests under the will and filed an answer to the bill filed by the executor and heir at law. That on October 1, 1920, the board of directors notified appellants that they had elected to terminate the services of appellants in the case pending and requested appellants to withdraw the answer filed by appellants to the bill; that appellants refused to withdraw the answer and refused to withdraw from the case and a written notice of such notice was served by them upon the board of directors; that no order substituting another solicitor was filed in the case; that appellants were paid nothing for the services rendered; that they had no express contract for fees and they had reason to believe that their clients would refuse to pay them any fees whatever for the services rendered and that they were entitled to the usual and customary fee; that on January 13, 1921, they served on appellees a notice in writing claiming a lien and interest in the cause of action and in the money in the hands of appellees belonging to or which might be found due the church because of the services rendered in obtaining the property so bequeathed and devised to them by the decedent.

The motion to dismiss was upon the ground that no claim, demand or cause of action was shown by the

petition to have been placed in appellant's hands for suit or collection, or upon which suit or action had been instituted upon which any verdict, judgement or decree could be entered, or any money or property could be received to which a lien for attorney's fees could arise under the statute.

The statute provides, (Hurd's Statute of 1919, page 1900), that attorneys shall have a alien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action had been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee for the service of such attorneys rendered or to be rendered for their clients on account of such suit, claim, demands or cause of action.

The language is that attorneys shall have a lien upon all claims, demands and causes of action which may be placed in their hands for suit or collection, or upon which suit or action has been instituted. When appellants were employed to defend against the bill filed to construe the will, their employment was not a claim, demand, or cause of action, placed in their hands for collection, or upon which suit or action had been instituted. They were simply employed to defend the suit filed to construe a will. The purpose of the statute is to give a lien for suits prosecuted by attorneys in which they may recover a judgement, or which may be settled, so that the parties cannot get together and settle and deprive the attorney of his fees. The language used does not include every employment of attorneys in every kind of a case but is expressly limited to claims and demands and causes of action placed in their hands. Appellants may

petition to have been placed in appellant's hands for suit or collection, or upon which suit or action had been instituted upon which any vendee, judgment or decree could be entered, or any money or property could be received to satisfy a lien for attorney's fees could arise under the statute.

The statute provides, (Hurd's Statute of 1913, page 1800), that attorneys shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or in the absence of such agreement, for a reasonable fee for the service of such attorneys rendered or to be rendered for their clients on account of such suit, claim, demands or cause of action.

The language is that attorneys shall have a lien upon all claims, demands and causes of action which may be placed in their hands for suit or collection, or upon which suit or action has been instituted. When appellants were employed to defend against the bill filed to construe the will, their employment was not a claim, demand, or cause of action, placed in their hands for collection, or upon which suit or action had been instituted. They were simply employed to defend the suit filed to construe a will. The purpose of the statute is to give a lien for suits prosecuted by attorneys in which they may recover a judgment, or which may be settled, so that the parties cannot get together and settle and deprive the attorney of his fees. The language used does not include every employment of attorneys in every kind of a case but is expressly limited to claims and demands and causes of action placed in their hands. Appellants may

have a cause of action against their client for services rendered, but they have no claim for lien against the fund now in the hands of the executor or the devisee.

The original suit to construe the will was filed to the October term, 1920. On December 31, 1920, which was one of the days of the October term, 1920, a demurrer to the bill was sustained and the bill dismissed. The petition for a lien was not filed as a separate suit but was filed on January 15, 1921, in the original case which had been dismissed at the prior October term. It is urged by appellees that upon the adjournment of the October term, 1920, the court lost all jurisdiction over the case filed to construe the will, and the order of dismissal became final and the court was without authority to determine in the suit so dismissed, the petition filed by appellants at a subsequent term. There is probably merit in this contention, but as the judgment must be affirmed upon other grounds we have not passed upon this question.

The judgment will be affirmed.

Judgment Affirmed.

have a cause of action against their client for damages rendered, but they have no claim for lien against the funds now in the hands of the executor on the devisee.

The original suit to construe the will was filed to the October term, 1921. On December 21, 1920, which was one of the days of the October term, 1920, a demurrer to the bill was sustained and the bill dismissed. The petition for a lien was not filed as a separate suit but was filed on January 15, 1921, in the original case which had been dismissed at the prior October term. It is urged by appellees that upon the adjournment of the October term, 1920, the court lost all jurisdiction over the case lien to construe the will, and under of dismissal became final and the court had without authority to determine in the suit so dismissed, the petition filed by appellants as a subsequent term. Then it necessarily merit in this contention, but as the judgment must be affirmed upon other grounds we have not passed upon this question.

The judgment will be affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson
Clerk of the Appellate Court.

6926

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6926. Agenda No.29

GEORGE W. DAVIDSON, Appellee, VS. WILLIAM GOURLEY, JANE GOURLEY and JOHN MARTIN, Co-partners doing business as LAKE FOREST LUMBER COMPANY, Appellants.	)	Appeal from Circuit Court Lake County.

Bartlow, J.

Appellee, George W. Davidson, began an action on the case in the circuit court of Lake County against appellants, William Gourley, Jane Gourley and John Martin, co-partners doing business as the Lake Forest Lumber Company, to recover damages to his automobile arising out of a collision with a truck of appellants. The jury returned a verdict in favor of appellee for $754.00. Judgment was rendered upon the verdict and this appeal was prosecuted.

The declaration consisted of three counts. The negligence alleged in the first count was that the driver of appellant's truck carelessly, negligently and improperly drove said truck, and suddenly , without warning, ran said truck from a private roadway on to the public highway immediately in front of appellee's automobile, so that appellee's automobile ran with great force into the truck and damaged the automobile. The negligence alleged in the second count is that the appellants employed an incompetent driver for their truck. The third count alleged that appellants' driver failed to slow down his truck on approaching the highway and failed to see if the highway was clear.

Martlow, J.

Appellee, George W. Davidson, began an action on the case in the circuit court of Lake County against Appellants, William Gourley, Jane Gourley and John Smith, co-partners doing business as the Lake Forest Lumber Company, to recover damages to his automobile arising out of a collision with a truck of appellants. The jury returned a verdict in favor of appellee for $754.00. Judgment was rendered upon the verdict and this appeal was prosecuted.

The declaration consisted of three counts. The negligence alleged in the first count was that the driver of appellants's truck carelessly, negligently and improperly drove said truck, and suddenly, without warning, ran said truck down a private roadway on to the public highway immediately in front of appellee's automobile, so that appellee's automobile ran with great force into the truck and damaged the automobile. The negligence alleged in the second count is that the appellants employed an incompetent driver for their truck. The third count alleged that appellants' driver failed to slow down the truck on approaching the highway and failed to see if the highway was clear.

The evidence shows that on July I, 1920, about 2 o'clock P.M. appellants' truck was being driven west by its servant on Arden Shore drive at the intersection with Waukegan or Sheridan road. Sheridan road was a public highway extending north and south from Lake Bluff to North Chicago and lies immediately east of the tracks of the Chicago, North Shore & Milwaukee R.R. The highway is about seventy feet in width, the macadam or traveled part, about twenty-four feet wide with a three foot shoulder on each side. There are telegraph poles one hundred feet apart on the west side almost at the edge of the traveled part of the highway. Arden Shore drive is a private roadway or driveway extending east from Sheridan road, is about nineteen feet wide and the traveled part is about nine feet wide. The east side of Sheridan road, south of Arden Shore drive, was covered with dense foliage, trees and shrubs which extended almost to the traveled part. In approaching Arden Shore drive from the south, a car on Sheridan road would have to be within about fifty feet of Arden Shore drive before a car coming out of that drive would be visible at the entrance to the drive.

Appellee's seven-passenger car was being driven by Mrs. Davidson, wife of appellee, north from Lake Bluff to Waukegan along the east side of Sheridan road. Mrs. Muller sat in the front seat on the right hand side with Mrs. Davidson. Margaret Spellman, a girl sixteen years old, sat in a folding seat immediately behind Mrs. Davidson and in front of three ladies who occupied the rear seat.

As the Davidson car approached Arden Shore drive and when it was about thirty feet to forty feet south thereof, the truck of appellants came out of Arden Shore drive from the east, going west, and stopped, the front of the

truck in the center of Sheridan road. As soon as Mrs Davidson saw the truck she put on the brakes, both foot and emergency, but before the Davidson Car could stop or turn to the right or left, it ran into the truck with such force that the steel frame was broken, the body was bent, the wheels were broken and the car was otherwise damaged.

It is contended by appellants that the verdict is not sustained by the law or the evidence, and that the evidence shows that the driver or appellee's car was guilty of contributory negligence.

The evidence shows that Mrs. Davidson, the driver of appellee's car, was an experienced driver and had driven this car for about one year. There were no houses on Sheridan road in this immediate neighborhood. The first house south was about a half a mile away and the first buildings north were the Naval Station buildings also about half a mile away. Sheridan road is the mainly traveled highway between Chicago and Milwaukee and has very heavy traffic in both directions. A truck was standing on the west side of Sheridan road almost opposite Arden Shore drive. An automobile was coming south on the west side of Sheridan road traveling twenty-eight to thirty miles per hour and was about 150 feet north of Arden Shore drive when the truck came out of Arden Shore drive. There were telegraph poles one hundred feet apart on the west side of Sheridan road almost to the edge of the traveled part of the highway. Just west of Sheridan road are the tracks of the Chicago, North Shore & Milwaukee R.R.

With his view obstructed to the south, the driver of appellant's truck drove out of Arden Shore drive traveling about 4 to 6 miles an hour and stopped in the center of Sheridan road at a time when appellee's car was only about thirty to forty feet away. One witness testified that the driver of

truck in the center of Sheridan road. As soon as Mr. Davidson saw the truck she put on the brakes, both rear and emergency, but before the Davidson car could stop or turn to the right or left, it ran into the truck with such force that the wheel frame was broken, the body was bent, the wheels were broken and the car was otherwise damaged.

It is contended by appellants that the verdict is not sustained by the law or the evidence, and that the evidence shows that the driver of appellee's car was guilty of contributory negligence.

The evidence shows that Mrs. Davidson, the driver of appellee's car, was an experienced driver and had [illegible] car for about one year. There were no houses on Sheridan road in this immediate neighborhood. The Hines home south was about a half a mile away and the Hawk buildings north were the Naval Station buildings also about half a mile away. Sheridan road is the mainly traveled highway between Chicago and Milwaukee and has very heavy traffic in both directions. A truck was standing on the west side of Sheridan road almost opposite Arden Shore drive. An automobile was coming north on the west side of Sheridan road traveling twenty-eight to thirty miles per hour and was about 150 feet north of Arden Shore drive when the truck came out of Arden Shore drive. There were telegraph poles one hundred feet apart on the west side of Sheridan road almost to the edge of the traveled part of the highway. Just west of Sheridan road are the tracks of the Chicago, North Shore & Milwaukee R.R.

With his view obstructed to the south, the driver of appellant's truck drove out of Arden Shore drive traveling about 4 to 6 miles an hour and stopped in the center of Sheridan road at a time when appellee's car was only about fifty to forty feet away. One witness testified that the driver

the truck looked to the north and turned to the south. Mrs. Davidson, with her car traveling, as shown by a preponderance of the evidence, about twenty miles per hour, within thirty or forty feet, had to determine what action she would take. She was within the speed limits provided in Sec. 269 V Chap. I2I of the Statute. She could not stop her car within the thirty or forty feet, and she had obstructions both to the right and the left of the truck so she could not go around it on either side.

Appellants contend that under Sec. 269 ZG of Chap. I2I of the Statute, the driver of the truck had the right of way. This section provides that all vehicles traveling upon public highways shall give the right-of-way to other vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left. Sheridan road was a public highway. Arden Shore drive was a private drive or roadway upon which there was very little travel. The statute only applies to public highways and intersecting highways and not where public highways are intersected by private roads or driveways and therefore appellant's driver did not have the right of way. Regardless of this rule of the road, under the evidence, the view to the south being obstructed, it was the duty of the driver of the truck to exercise for his own safety and for the safety of those on Sheridan road, that degree of care which was in keeping with the conditions which confronted him. He did not have the right to blindly drive into Sheridan road and stop in the middle of it without taking proper precautions to see if cars were coming from the south. He could not see to the south until he got past the shrubbery on the east side of Sheridan road. He looked to the north and saw the car approaching going south. This car would arrive opposite Arden Shore drive about the time the track

would enter Sheridan road and the driver of the truck would have to avoid a collision with it. The driver of the truck drove out into Sheridan road and gave no warning of any kind. The occupants of the car going south saw that a collision was going to take place and they swung their car to the west off of the road to give as much room as possible to the truck. The driver of appellee's car could not go to the left of the truck because of the car coming from the north. Neither could she go to the right of the truck because the truck, which was eighteen or twenty feet long, blocked the way. Mrs. Davidson was confronted with sudden peril and she was not required to exercise all of the presence of mind and care of a prudent person who was not so suddenly confronted with sudden peril. Roberts vs. Chicago City Ry. Co., 262 Ills. 228. She was not required to act with that degree of care which time and deliberation might afford. Chicago & Alton Ry. Company vs. Carson I98 Ill.98.

Whether appellants were guilty of the negligence charged in the declaration and whether the driver of appellee's car was guilty of contributory negligence were questions of fact for the jury and we will not disturb the finding of the jury on these points unless that finding is clearly against the weight of the evidence. We think the evidence proves the negligence of appellants driver as charged in the declaration, and that the driver of appellee's car was in the exercise of due care and caution.

Appellee was asked whether his wife, who was driving the car , was familiar with Arden Shore drive and objection was properly sustained to this question because it called for a conclusion and not a fact. Mrs. Muller was asked what she did and what happened after the two cars came together and she said that they got out to see how badly the

would enter Sheridan road and the driver of the truck would have to avoid a collision with it. The driver of the truck drove out into Sheridan road and gave no warning of any kind. The occupants of the car going south saw that a collision was going to take place and they swung their car to the west out of the road to give as much room as possible to the truck. The driver of appellee's car could not go to the left of the truck because of the car coming from the north. Neither could she go to the right of the truck because the truck, which was eighteen or twenty feet long, blocked the way. Davidson was confronted with sudden peril and she was not required to exercise all of the presence of mind and care of a prudent person who was not so suddenly confronted with sudden peril. Schwartz v. Chicago City Ry. Co., 260 Ill. 322. She was not required to act with that degree of care which she could deliberation right either. Illinois C. R. R. Co. v. Leach, 114 Ill.

Whether appellants were guilty of the negligence charged in the declaration and whether the driver of appellee's car was guilty of contributory negligence were questions of fact for the jury and we will not disturb the finding of the jury on these points unless that finding is clearly against the weight of the evidence. We think the evidence proves the negligence of appellants driver as charged in the declaration, and that the driver of appellee's car was in the exercise of due care and caution.

Appellee was asked whether she, who was driving the car, was familiar with the place where the accident occurred. This question was properly sustained to this question because it called for a conclusion and not a fact. Mrs. Miller was asked what she did and what happened after the car came

people in the car were hurt. The latter part of the answer was not responsive to the question but was not harmful. Bert Easter testified that three or four weeks before the trial he had been employed by appellants in connection with the accident; that he took A.K. Stearns of Lake Forest, to the lumber yard of appellants, picked up two other men and took them to the scene of the accident and, after some talk, he took them back to the lumber yard; that he charged for his services but had not yet been paid; that he had driven a car for six or seven years and was in the garage business; that a short time after the accident he made a written statement to one of the men he believed to be an insurance man. Complaint is made to all of this evidence of Easter. The abstract shows that the only objection made to any of this evidence was to the first question, whether the witness had been employed by appellants in connection with the accident since it occurred. The rest of this evidence was admitted without objection and error cannot be assigned on it.

Upon the argument it is claimed by appellants that consel for appellee stated that after the accident Easter drove insurance men out to view the ground where the accident occurred and counsel wondered why they waited so long, and then counsel made some other reference to insurance. This statement is assigned to error. It is not claimed that any such remarks appear either in the record or the abstract and they are, therefore, not subject to review. Conrade vs. St Louis Ry. Company, 20I Ill. App. 276.

Error is assigned on the refusal of the court to give six instructions offered on behalf of appellants. One instruction was given on behalf of appellee and seven on behalf of appellants. We have compared the six instructions refused on behalf of appellants with those given and find that each

instruction refused, except the first, was covered by some instruction given. The first instruction refused contained the general statement of the proposition of law as to when the testimony of one credible witness might be entitled to more weight than the testimony of other witnesses. This instruction might properly have been given, but its refusal was not error. From an examination of all the instructions, we think the jury was fully instructed on behalf of the appellants and there was no error in refusing the six instructions offered by them.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson

Clerk of the Appellate Court.

6927

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6927. Agenda No. 30.

MARGARET SPELLMAN, a minor by LUCY B. JUDSON, her next friend, Appellee,	)	
VS.	)	Appeal from Circuit Court , Lake County.
WILLIAM GOURLEY, JANE GOURLEY and JOHN MARTIN, Co-partners doing business as LAKE FOREST LUMBER COMPANY, Appellants.	)	

222 I.A. 666

Partlow, J.

This is an action on the case in the Circuit Court of Lake County, brought by appellee, Margaret Spellman, a minor, by Lucy B. Judson, her next friend, against appellants, William Gourley, Jane Gourley and John Martin, co-partners doing business as Lake Forest Lumber Company, to recover damages for personal injuries sustained by appellee in an automobile collision. The jury returned a verdict for $1000.00 in favor of appellee. Judgement was rendered on the verdict and this appeal was prosecuted.

The facts in this case are the same as those in the case of George W. Davidson vs. William Gourley, et al, decided at this term of court and it will not be necessary to repeat them. The pleadings and evidence in this case are substantially the same as in the Davidson case except that several witnesses were called in this case who did not testify in the other case. Margaret Spellman, a sixteen year old girl, was riding on the left hand side of the car

MARGARET SPELLMAN,
a minor by LUCY B.
JUDSON, her next
friend,

Appellee,

vs.

WILLIAM WYNNE, JAMES
GOURLEY and JOHN MARTIN,
co-partners doing busi-
ness as LAKE NORFOLK
LUMBER COMPANY,

Appellants.

Appeal from Circuit
Court, Lake County.

Partlow, J.

This is an action on the case in the Circuit Court of Lake County, brought by appellee, Margaret Spellman, a minor, by Lucy B. Judson, her next friend, against appellants, William Wynne, James Gourley and John Martin, co-partners doing business as Lake Norfolk Lumber Company, to recover damages for personal injuries sustained by appellee in an automobile collision. The jury returned a verdict for $1000.00 in favor of appellee. Judgment was rendered on the verdict and this appeal was prosecuted.

The facts in this case are the same as those in the case of George W. Davidson vs. William Gourley, et al., decided at this term of court and it will not be necessary to repeat them. The pleadings and evidence in this case are substantially the same as in the Davidson case except that several witnesses were called in this case who did not testify in the other case. Margaret Spellman, a sixteen year old girl, was riding on the left hand side of the car

in a small seat just back of the front seat. She was employed by Mrs. Muller who was in the front seat and was on her way to Waukegan to get a new dress. She testified that she was paying very little attention to the road, was thinking of something else and did not know of the presence of the truck until just about the time of the collision.

The first error urged is that the verdict is contrary to the evidence and that appellee was guilty of contributory negligence. We held in the Davidson case that the verdict was sustained by the evidence and that Mrs. Davidson, the driver of the car, was not guilty of contributory negligence and that the driver of the truck was guilty of the negligence charged in the declaration. While there is some evidence in this case which was not in the other case, the additional evidence in no way changes our opinion on this question, but tends to further convince us that we were correct in that decision. If Mrs. Davidson was not guilty of contributory negligence, then under the evidence appellee was not guilty of negligence. The appellee did not own the car. She had no control over the driver, but was merely a guest or licensee. She had no warning or notice of any danger and at the time of the accident was exercising that degree of care that any ordinary, prudent person, in the same situation, would have exercised. Even conceding that Mrs. Davidson was negligent , such negligence would not be imputed to the appellee. Chicago & Alton Ry. Company vs. Vipond, 212 Ill. 199. Flynn vs. Chicago City Ry. Co., 250 Ill, 460.

Complaint is nade that the court refused to give three instructions offered on behalf of appellants but no where from the argument or abstract are we able to ascertain

in a small seat just back of the front seat. She was enveloped by Mrs. Muller who was in the front seat and was on her way to Washington to get a new dress. She testified that she was paying very little attention to the road, was thinking of something else and did not know of the presence of the truck until just about the time of the collision.

The first error urged is that the verdict is contrary to the evidence and that appellee was guilty of contributory negligence. We hold in the Davidson case that the verdict was sustained by the evidence and that Mrs. Davidson, the driver of the car, was not guilty of contributory negligence and that the driver of the truck was guilty of the negligence charged in the declaration. While there is some evidence in this case which was not in the other case, the additional evidence in no way changes our opinion on this question, but tends to further convince us that we were correct in that decision. If Mrs. Davidson was not guilty of contributory negligence, then under the evidence appellee was not guilty of negligence. The appellee did not own the car. She had no control over the driver, but was merely a guest or licensee. She had no warning or notice of any danger and at the time of the accident was exercising that degree of care that any ordinary, prudent person, in the same situation, would have exercised. Even conceding that Mrs. Davidson was negligent, such negligence would not be imputable to the appellee. [illegible] v. Chesney, [illegible], 213 Ill. 177. Also [illegible] v. [illegible], [illegible] 114, [illegible].

Complaint is made that the court refused to give three instructions offered on behalf of appellants but no where from the argument or abstract are we able to ascertain

what these instructions were. They are not set out or argued, and this fact would be sufficient to justify us in refusing to consider this assignment of error. The abstracts shows that one instruction was refused on behalf of appellants. It stated an abstract proposition of law as to the credibility of witnesses and it might properly have been given but its refusal did not injure the appellants for the reason that the jury was properly instructed in that regard.

It is next insisted that the judgement of $1000.00 is excessive. The evidence shows that appellee was rendered unconscious and remained in that condition for about 20 minutes. She regained consciousness long enough to tell where she was injured and again became unconscious. She was taken to the Red Cross headquarters at Great Lakes and then to the home of Mrs. Muller where she was in bed for two weeks. Her legs were injured, two ribs were broken and she complained of pain in her stomach and left side. She testified that for six weeks she could not do any work except what was necessary, and the pain in the left side lasted about a month, during which time she could not sleep naturally. The adhesive strips placed upon her broken ribs remained there about three weeks. On the trial she was examined by appellant's physician, who testified that he found she was nervous and, on the first examination, complained of pains wherever he touched her to such an extent that she grabbed his hand and attempted to leap from the couch on which she was reclining. After he explained to her that he would not hurt her, he made the examination and she did not make any further complaint. He also testified that there was no organic injury, but that she was in a nervous condition and inclined to accept any suggestion of pain. He could not positively state whether she had a misplacement. Taking into consideration the in-

what these instructions were. They are not set out or argued, and this fact would be sufficient to justify us in refusing to consider this assignment of error. The abstracts show that one instruction was refused on behalf of appellants. It stated an abstract proposition of law as to the credibility of witnesses and it might properly have been given but its refusal did not injure the appellants for the reason that the jury was properly instructed in that regard.

It is next insisted that the judgment of $1000.00 is excessive. The evidence shows that appellee was rendered unconscious and remained in that condition for about 30 minutes. The regained consciousness long enough to tell where she was injured and again became unconscious. She was taken to the Red Cross headquarters at Great Lakes and then to the home of Mrs. Miller where she was in bed for two weeks. Her legs were injured, two ribs were broken and she complained of pain in her stomach and left side. He testified that for six weeks she could not do any work except what was necessary, and the pain in the left side lasted about a month. [illegible]

about three weeks. On the trial she was examined by appellant's physician, who testified that he found she was nervous and, on the first examination, complained of pain whenever he touched her to such an extent that she grabbed his hand and attempted to keep from the touch on which she was complaining. After he explained to her that he would not hurt her, he made the examination and she did not make any further complaint. He also testified that there was no organic injury, but that she was in a nervous condition and inclined to accept any suggestion of pain. He could not positively state whether [illegible]

juries to the appellee, the length of time she was in bed and the fact that she has not yet fully recovered, we do not think the damages were excessive. Chicago City Railway vs. Hyndshaw, II6 Ill. App. 368.

We find no reversible error and judgement is affirmed.

Judgement affirmed.

Juries to the appellee, the length of time she was in bed and the fact that she has not yet fully recovered, we do not think the damages were excessive. Chicago City Railway vs. Kjellander, 134 Ill. App. 444.

We find no reversible error and judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6933. Agenda No. 56.

RASMUS RASMUSSEN Appellant, Vs. ESTATE OF JOSEPH I. LANG, DECEASED. Appellee.	)	Appeal from Circuit Court of McHenry County.

222 I.A. 666

Partlow, J.

Appellant, Rasmus Rasmussen, filed his claim in the county court of McHenry county against the estate of Joseph I. Lang. The claim was allowed by the county court but, on appeal to the circuit court, the claim was disallowed and from that order this appeal was prosecuted.

On July 19, 1916 appellant purchased from Anna and Joseph W. Parks the Park View Hotel on Nippersink Lake, in Lake County. The property was sold subject to an encumbrance of $4500.00 which the purchaser assumed and agreed to pay. In addition to this encumbrance, appellant placed in the hands of Joseph I. Lang, an attorney, $1000.00 out of which Lang was to pay all other encumbrances against the property in excess of $4500.00. A receipt was given by Lang to appellant, which recited that after all the encumbrances had been paid, the balance of the $1000.00 was to be paid to the order of the grantors in the deed, who are Anna and Joseph W. Parks. It is claimed that the $1000.00 was not sufficient to pay the encumbrances due; that Lang only paid about $60.00 of these encumbrances and that appellant paid more than $1000.00 to remove liens on the property. Lang subsequently died and the claim was filed for $940.00 against his estate, being the

FLORUS RASMUSSEN, Appellant,	
Vs.	Appeal from Circuit Court of Lafourche County.
ESTATE OF JOSEPH L. LANG, Appellee.	

Appellant, Florus Rasmussen, filed his claim in the county court of Lafourche, county against the estate of Joseph L. Lang. The claim was allowed by the county court but, on appeal to the circuit court, the claim was disallowed and from that order this appeal was prosecuted.

On July 19, 1916 appellant purchased from Jean and Joseph W. Parks the back view lot on Highwaldin Lake, in Lafo County. The property was sold subject to an encumbrance of $4500.00 which the purchaser assumed and agreed to pay. In addition to this encumbrance, appellant placed in the hands of Joseph L. Lang, an attorney, $1000.00 out of which Lang was to pay all other encumbrances against the property in excess of $4500.00. A receipt was given by Lang to appellant, which recited that after all the encumbrances had been paid, the balance of the $1000.00 was to be paid to the order of the grantors in the deed, who are Jean and Joseph W. Parks. It is claimed that the $1000.00 was not sufficient to pay the encumbrances due; that Lang only paid about $500.00 of these encumbrances and that appellant paid more than $1000.00 to remove liens on the property. Lang subsequently died and the claim was filed for $940.00 against his estate, being the

$1000.00 less the $60.00 paid by him.

The appellee offered in evidence a certain book of account of Joseph I. Lang purporting to show the distribution of a large portion of this $1000.00. The book was in the handwriting of a book-keeper who testified that she made the entries at the direction of Lang, but she had no personal knowledge of the truth of the entries. It is objected by appellant that this book was a self-serving statement of Lang; was not kept in a regular manner; that the keeper of the book had no personal knowledge of the truth of the entries, and for these reasons the book should not have been admitted in evidence.

The book was not identified as provided by Sec. 3, Chap. 51 of the Statute and was not admissable in evidence if any objection had been made to it. When the book was offered counsel for appellant said, "I object to it, except for one purpose to show these entries were made, that is all, no evidence of payment." If the objection had been to the competency of the book it no doubt would have been sustained but the objection was special and limited to the point that the book was not evidence of payment.

In connection with this book account, the court gave the sixth instruction on behalf of the appellee, which told the jury that the account book admitted in evidence constituted legal evidence and that the entries appearing therein had not been contradicted or disproved by other competent evidence, and such account should be considered by the jury in arriving at their verdict. This book contained a self-serving statement of Lang, and, even under the partial objection, its admission in evidence, when taken in connection with the sixth instruction, constituted error. The book did not constitute legal evidence and the account should not have been considered by the jury.

$1000.00 loan who $80.00 paid by him.

The appellee offered in evidence a card in lieu of account of Joseph I. Long purporting to show the transaction of a large portion of this $1000.00. The book was in the handwriting of a book-keeper who testified that she made the entries at the direction of Long, but she had no personal knowledge of the truth of the entries. It is objected by appellant that the book was a self-serving statement of Long; was not kept in a regular manner; that the keeper of the book had no personal knowledge of the truth of the entries, and for these reasons the book should not have been admitted in evidence.

The book was not identified as provided by Sec. 3, Chap. 51 of the Statute and was not admissible in evidence if any objection has been made to it. When the book was offered counsel for appellant said, "I object to it, except for the purpose to show those entries were made, that is all, no evidence of payment." If the objection had been to the competency of the book it no doubt would have been established but the objection was special and limited to the point that the book was not evidence of payment.

In connection with this book account, the account gave the sixth instruction on behalf of the appellee, which told the jury that the account book admitted in evidence constituted legal evidence and that the entries appearing therein had not been contradicted or disproved by other competent evidence, and such account should be considered by the jury in arriving at their verdict. The book constituted a self-serving statement of Long, and, even under the verbal objection, its admission in evidence, when taken in connection with the sixth instruction, constituted error. The book did not constitute legal evidence and the account does not have been [illegible] by the [illegible].

It is contended by appellee that appellant cannot recover for the reason that under the receipt given by Lang to appellant any unexpended balance of the $1000.00 was the property of Anna and Joseph W. Parks and appellant showed no legal or equitable assignment of such balance.

The money placed in the hands of Lang constituted a trust fund for the payment of the encumbrances and a court of equity could enforce this trust. Jenkins vs. Doolittle 69 Ill. 415. In the adjustment of claims against estates the probate court exercises an equitable jurisdiction and may resort to equitable procedure. Clemens vs. Crane 234 Ill. 215. A purchaser of encumbered property who, not having assumed the encumbrance, is obliged to pay off claims to protect his own interest or perfect the title, is entitled to be subrogated to the position of the encumbrancer with respect to all of the latter's rights, securities, remedies and priorities, Hazle vs. Bondy 173 Ill. 302.

The $1000.00 was placed in the hands of Lang by appellant to pay off encumbrances on the property in excess of the $4500.00 mortgage. Appellant claims that Lang failed to pay these encumbrances with the exception of $60.00 and it is stipulated that appellant paid out $1000.00 in excess of the $4500 on account of liens on the property. Under this state of the proof there could be no balance of the $1000.00 left after the payment of encumbrances and if Lang did not pay out all of the $1000.00 placed in his hands and appellant, in order to protect his property, was required to pay in excess of $1000.00, then any unexpended portion of the $1000.00 left in the hands of Lang was the property of appellant.

For the errors indicated the judgement is reversed and the cause remanded.

Reversed and remanded.

It is contended by appellee that appellants con-
not recover for the reason that under the needed giving by
lang to appellant any unexpended balance on the $1000.00 is the
property of Tom and Joseph P. Marks. And appellant should no
legal or equitable assignment of such balance.

The money placed in the hands of Lang constituted a
a trust fund for the payment of the encumbrances and a court of
equity could enforce this trust. Tomkins vs. Doubtfile 69 Ill.
[illegible]. It has jurisdiction [illegible]
court can place an equitable jurisdiction and may compel [illegible]
[illegible] equitably [illegible]. Tomkins vs. [illegible]
[illegible]
[illegible] at the title, is entitled to be subrogated to the position
[illegible] encumbrancer with respect to all of the Mahler's rights,
[illegible], remedies and priorities, Marks vs. Donly 124 Ill. 500.

The $1000.00 was placed in the hands of Lang by
[illegible] to pay off encumbrances on the property [illegible] on
[illegible].00 mortgage. Appellant claims that Lang [illegible] to
[illegible] encumbrances with the amount of $[illegible].00 and [illegible]
[illegible] that appellees paid out $[illegible].00 in excess on the
[illegible] on account of liens on the property. Under the terms of
the proof there could be no balance of the $1000.00 left [illegible]
[illegible]

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson

Clerk of the Appellate Court.

6444

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on NOV 9 1921 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6944. Agenda #45.

Chauncey Moore, a minor, by Samella Moore, his next friend, Appellee, Vs. Clark & Company, a corporation, Appellant.	)	Appeal from the Circuit Court of Peoria County.

222 I.A. 666

Partlow, J.

This is an action on the case in the circuit court of Peoria County by appellee, Chauncey Moore, a minor, by Samella Moore, his next friend, against appellant, Clark & Company, a corporation, for personal injuries received in an automobile accident. There was a trial by jury and a verdict for $1250.00 for appellee. Upon motion for a new trial appellee remitted $300.00 and judgment was rendered for $950.00, from which judgment this appeal was prosecuted.

The first question for determination is whether the verdict is sustained by the evidence. The first and second counts of the declaration contain a general charge of negligence. The third count charges a failure to sound the horn. The fourth charges an illegal rate of speed. The fifth charges that the car had defective brakes but this count was withdrawn.

Armstrong avenue in the city of Peoria is an east and west street and is intersected by California avenue, which extends north and south at the east end of the 300 block and by White street which extends north and south at the west end of that block. The accident occurred about two hundred

6944. Agenda #45.

Chauncey Moore, a minor, by Samella Moore, his next friend, Appellee,	)	Appeal from the Circuit Court of Peoria County.
Vs.	)	
Clark & Company, a corporation, Appellant.	)	

222 I.A. 666

Partlow, J.

This is an action on the case in the circuit court of Peoria County by appellee, Chauncey Moore, a minor, by Samella Moore, his next friend, against appellant, Clark & Company, a corporation, for personal injuries received in an automobile accident. There was a trial by jury and a verdict for $1250.00 for appellee. Upon motion for a new trial appellee remitted $300.00 and judgment was rendered for $950.00, from which judgment this appeal was prosecuted.

The first question for determination is whether the verdict is sustained by the evidence. The first and second counts of the declaration contain a general charge of negligence. The third count charges a failure to sound the horn. The fourth charges an illegal rate of speed. The fifth charges that the car had defective brakes but this count was withdrawn.

Armstrong avenue in the city of Peoria is an east and west street and is intersected by California avenue, which extends north and south at the east end of the 300 block and by White street which extends north and south at the west end of that block. The accident occurred about two hundred

Chauncey Moore, a minor,
by Samella Moore, his next
friend,

Appellee,

Vs.

Clark & Company, a corporation,

Appellant.

Appeal from the Circuit
Court of Peoria County.

22221 A. 666

Mr. P. O.

This is an action on the case in the circuit court of Peoria County by appellee, Chauncey Moore, a minor, by Samella Moore, his next friend, against appellant, Clark & Company, a corporation, for personal injuries received in an automobile accident. There was a trial by jury and a verdict for $1250.00 for appellee. Upon motion for a new trial appellee remitted $500.00 and judgment was rendered for $750.00, from which judgment this appeal was prosecuted.

The first question for determination is whether the verdict is sustained by the evidence. The first and second counts of the declaration contain a general charge of negligence. The third count charges a failure to sound the horn. The fourth charges an illegal rate of speed. The fifth charges that the car had defective brakes but this charge was withdrawn.

Kensington avenue in the city of Peoria is an east and west street and is intersected by California avenue, which extends north and south at the east end of the 900 block and by White street which extends north and south at the west end of that block. The accident occurred about two hundred

feet west of the east end of the block on Armstrong avenue and about one hundred feet east of the west end of the block. It is up-grade from the east end of the block to the scene of the accident. Armstrong avenue is paved with brick and is twenty-two feet wide. There is a sidewalk on each side of the street with a narrow grass plot between the walk and the curb. Appellant's Ford delivery car, driven by William Sturm, turned into Armstrong avenue at a cross street east of California avenue and proceeded west on Armstrong avenue. As the driver approached the intersection of California avenue he saw some children going from the south to the north side of street, about one hundred feet ahead of him. They went on to the sidewalk on the north side of the street. When the car was only a few feet east of the children the appellee, a little colored boy, was pushed by a white boy, or ran backward into the street. He came in contact with the car either by falling against it or by being struck by it. His left leg was broken and he received a cut in the back of the head and over his right eye. There were two eye witnesses who testified how the accident happened. One was Rhoda Barnard a witness for appellee, and the other was William Sturm the driver of the car.

Mrs Barnard lived at 30I East Armstrong avenue at the corner of White street. Her house was on the north side of the street and was on a tarrace above the street. The porch was about fifteen feet from the sidewalk. She testified that on the evening of the accident, April I4, I920, about 5:30 6'clock, she was at the supper table and heard a noise on her front porch. She went to the front door and saw a little neighbor girl sitting on the tarrace. Two boys, Edgar Hinckle and appellee, Chauncey Moore, were on the sidewalk. The little girl ran down to the sidewalk and the three children began

foot west of the east end of the block of Armstrong Avenue and about one hundred feet east of the west end of the block. It is up-grade from the east end of the block to the middle of the resident. Armstrong Avenue is paved with brick and is twenty-two feet wide. There is a sidewalk on each side of the street with a narrow grass plot between the curb and the [illegible]. [illegible] turned into Armstrong Avenue at a cross street just of Wilkinson Avenue and proceeded west on Armstrong Avenue. [illegible] driver approached the intersection of Wilkinson Avenue he saw some children going from the south to the north side on Wilkinson, about one hundred feet ahead of him. They went on to the sidewalk on the north side of the street. When the car was only [illegible] feet east of the children the [illegible], a little colored [illegible] pushed by a white boy, or was [illegible] into the street. [illegible] contact with the car either by striking against it or [illegible] struck by it. His left leg was broken and he received [illegible] in the back of the head and over his right eye. Three men [illegible] witnesses who travelled for the railroad in [illegible]. One [illegible] Burnside's witness for appellee, and the other two [illegible] from the driver of the car.

The accident happened at 801 East Armstrong Avenue at the corner of White street. Her house was on the north side of the street and was one hundred feet from the street. The [illegible] the evening of the accident, April 16, 1920, about [illegible] o'clock, the car of the appellee was being [illegible] [illegible] sitting on the terrace. The boys, Hugo [illegible] [illegible] the sidewalk and the street [illegible]

hitting each other with a rag or sock. She first thought they were fighting but later saw they were playing. One of them gave Chauncey Moore a shove. He had a little wagon in the street and started toward it and the other children ran around and headed him off. Chauncey staggered toward the wagon and into the street about ten feet. The automobile coming from the east struck him. She testified that the car swerved north toward the boy just before he was struck. The automobile was on the lower side of the street when the accident happened. Just about the time the car struck the boy it swerved back to the south and struck the curb and a pole inside of the curb. When it hit the pole it bounded back about ten feet from the pole and then jumped forward again and close to the pole when it stopped. She testified the driver swerved the car twice and struck the boy when he swerved the second time, and that the car was going thirty-two or thirty-three miles per hour.

William Sturm testified that the windshield on the car was single strength glass and the pins which held it in position were gone and he had pieces of a cigar box wedged in to keep the upper glass from falling out. He was going east on Armstrong avenue and when he came to California avenue he saw some children on Armstrong avenue going from the south to the north side of the street. He saw they were scuffling andslowed down the car and tooted the horn. He swung his car to the left and just as he got opposite them the little colored boy came falling backwards towards him. He turned the car sharply to the left. There was an opening or driveway in the curbing and a telephone pole just beyond the driveway. He hit the curb with the left front wheel, the car bounced up on the curb and struck the pole but not hard. When he hit the curb the stick came out, the windshield dropped and the glass broke.

hitting each other with a rag or sock. The kids thought they were fighting but later when they were playing. As of then gave Chauncey Moore 2 shove. He had a little wagon in his hands and started toward it and the other children saw around headed him off. Chauncey staggered toward the wagon and into the street about ten feet. The automobile coming from the east struck him. She testified that the car swerved north around the boy just before he was struck. The automobile was on the lower side of the street when the accident happened. Just about the time the car struck the boy it swerved back to the south and struck the curb and a pole inside of the curb. When it hit the pole it bounded back about ten feet from the pole and then jumped forward again and close to the pole when it stopped. She testified the driver swerved the car twice and struck the boy when he swerved the second time, and that the car was going thirty-two or thirty-three miles per hour.

William Strum testified that the windshield on the car was single strength glass and the pieces which held it in position were gone and he had pieces of a paper box wedged in to keep the wiper glass from falling out. He was going east on Armstrong avenue and when he came to California avenue he saw some children on Armstrong avenue going from the south to the north side of the street. He saw the boy walking sideways down the car and looked the horn. He swung his car to the left and just as he got opposite them the little colored boy came falling backwards towards him. He turned the car slightly to the left. There was an opening or driveway in the curbing and a telephone pole just beyond the driveway. He hit the curb with the left front wheel, the car bounced up on the curb and struck the pole but not hard. When he hit the curb the cotter came out, the crankshaft dropped and the wheel broke.

After the accident the boy was lying in the center of the street a little past the rear wheel of the car. When the boy hit the car he was staggering backwards and the revolving tire threw him away from the car. Sturm testified that he did not see it, but was positive that the back of the boy's head hit the hub cap. When he swung from the center of the street towards the left he was less than three feet from the left hand curb and about fifteen feet from the pole when the boy was pushed into the street. The front fender was thirty-four inches from the ground and as the boy reached the car his head went under the front fender and missed it. The boy was falling backward before he touched the car or the car touched him. What made him fall backwards the witness could not positively say. The automobile did not run over the boy. Sturm testified that the car did not bounce back from the post and go forward again, as testified by Mrs. Barnard, but he had to push the car back from the pole to get space between the car and the pole so that he could crank the car. The only damage to the automobile was that the windshield slipped out and broke. He testified he was going about ten miles per hour.

We refrain from expressing any opinion as to the weight of the evidence for the reason that the judgment will have to be reversed because of errors on the trial. We deem it sufficient to say that the evidence was close and in sharp conflict and it was necessary under these circumstances that the jury be accurately instructed and that there be no serious error in the record.

Each count of the declaration charged that appellee was seven years of age at the time of the accident and that he was in the exercise of due care and caution for his own safety. On direct examination the mother of appellee testified that he was seven years old and would be eight years old on

After the accident the boy was lying in the middle of the street a little past the near wheel of the car. [illegible] the boy hit the car he was stooping backward and the force of the blow threw him away from the car. Brown testified that he did not see it, but was positive that the hood of the boy's head hit the left cap. When he sprang from the center of the street towards the left he was less than three feet from the left hand curb and about fifteen feet from the pole when the boy was picked up into the street. The front fender was thirty-four inches from the ground and as the boy rebounded the car had [illegible] the front fender and wrapped it. The boy was [illegible] between the fender and he bounced the car on the car [illegible] the boy-- [illegible] the witness could not positively say. The automobile did not run over the boy. Brown testified that the car did not bounce back from the post but go forward again, as testified by Mrs. Hammond, but he had to push the car off from the pole to get space between the car and the pole so that he could crank the car. The only damage to the automobile was that the lamp-shield slipped out and broke. He travelled in the going about ten miles per hour.

We refrain from expressing any opinion as to the weight of the evidence for the reason that the judgment will have to be reversed because of error on the trial. We deem it sufficient to say that the evidence was close and in sharp conflict and it was necessary under these circumstances that the jury be accurately instructed and that there be no serious error in the record.

Each count of the declaration charged that deceased was seven years of age at the time in the [illegible] and [illegible] he was in the exercise of due care and caution for his own safety. On direct examination the mother of deceased testified that he was seven years old and would be [illegible] old on

April 23, 1921. On cross-examination she testified that he was born April23, 1913. The accident occurred on April 14, 1920. Appellant offered in evidence the appellee's application for entrance into the public schools which the evidence shows was in the handwriting of the mother, and it gave the date of his birth as April 23, 1912. Whether he was six or seven years old was important in determining whether he was chargeable with contributory negligence. Names vs. Chicago City Ry. Co., 180 Ill. App., 483; Chicago City Ry. Co. vs. Tuohy, 196 Ill. 410.

The court, by appellee's third instruction, told the jury that if the jury believed from the evidence that appellee was under seven years of age he could not be guilty of or charged with negligence. The declaration was not amended to meet the new evidence. The averment that appellee was seven years old and in the exercise of due care did not justify an instruction based upon the theory that he was under seven years of age and was not required to exercise due care. Wild vs. Chicago, Burlington & Quincy Ry. 151 Ill. App. 110; McCabe vs. Atchinson, Topeka & Santa Fe, 154 Ill. App . 380; Stevens vs. Lewandowski, 66 Ill. App. 538; and Himrod Coal Co. vs. Clingan, 114 Ill. App. 568.

Appellee contends that if appellant intended to insist on the allegations of the declaration it should have objected to the evidence on the ground that it was at variance with the declaration, whereupon appellee could have amended the declaration so as to conform to the facts. The declaration should state the correct grounds of the cause of action. If appellee was under seven years old, that fact should have been alleged in the declaration, together with the further allegation that he was not chargeable with contributory negligence. The mother of appellee, who was his next friend in this suit,

April 25, 1921. On cross-examination she testified that he [illegible]

1920. Appellant offered i evidence the appellee's article with for entrance into the public schools which the evidence shows was in the handwriting of the mother, and it gave the date of his birth as April 25, 1913. Whether he was six or seven years old was immaterial in determining whether he was chargeable with contributory negligence. Hanes vs. Chicago City Ry. Co., 190 Ill. App., 486; Chicago City Ry. Co. vs. Trolby, 190 Ill. 410.

The court, by appellee's third instruction, told the jury that if the jury believed from the evidence th t appellee was under seven years of age he could not be guilty of or charged with negligence. The declaration was not amended to meet the new evidence. The argument that appellee was seven years old and in the exercise of due care did not justify an instruction based upon the theory that he was under seven years of age and was not required to exercise due care. Wild vs. Chicago, Burlington & Quincy Ry. 201 Ill. App. 170; McCabe vs. Atchinson, Topeka & Santa Fe, 164 Ill. App. 380; Stevens vs. Swandowski, 66 Ill. App. 356; and Hinrck Dock Co. vs. Olinger, 114 Ill. App. 588.

Appellee contends that if appellant intended to insist on the allegations of the declaration it should have objected to the evidence on the ground that it was at variance with the declaration, whereupon appellee could have amended the declaration so as to conform to the facts. The declaration should state the correct grounds of the cause of action. If appellee was under seven years old, that fact should have been alleged in the declaration, together with the further allegation that he was not chargeable with contributory negligence. The mother of appellee, who was his next friend in the suit,

knew his age at the time the declaration was filed and testified to his age at the trial, and yet each count of the declaration alleged that he was seven years old and was in the exercise of due care and caution. In some cases this error might not be serious, but that was not true in this case. The facts in the case were close and the variance between the declaration and the proof injected into the case a question not raised by the pleading, led to questionable instructions and arguments, and constitutes reversible error.

Complaint is made of the second, third, fourth and fifth instructions given on behalf of appellee and six instructions refused on behalf of appellant. The second instruction given is not accurate. It did not, in terms, define probable cause but attempted to tell the jury under what circumstances a verdict should be returned against appellant. It directed a verdict but ignored all reference to any contributory negligence of which appellee might be guilty. It also told the jury what they should do if they believed that appellee had proved his case by a preponderance of the evidence. It failed to refer to the declaration and failed to tell the jury what cause of action appellee was required to prove. The fourth and fifth instructions told the jury that the damages, if any, should be estimated from all the facts and circumstances in evidence. In Krankowski vs. Aurora, Elgin & Chicago R.R., 167 Ill. App., 469 on page 475 the Court said "Instruction number five for appellee stated that in determining the amount of damages appellee was entitled to recover in this case, the jury had the right to, and should take into consideration all the facts and circumstances, as proved by the evidence before them. The instruction does not accurately state the law, and is subject to some of the same objections as number four above mentioned. In determining the amount of damages the

know his age at the time the defendant was first and verbally-
ified to his age on the trial, and yet such issue [illegible]
ther alleged that he was [illegible] [illegible] [illegible] [illegible]
of the case and conviction. In some cases that error of fact
not be material, but that age was not there in this case. [illegible]
in the case were close and the evidence between the defendant-
tion and the proof introduced have the case [illegible] [illegible]
by the pleading, let to unauthorized instructions and arguments,
and constitutes reversible error.

Complaint is made of the second, third, fourth
and fifth instructions given on behalf of appellee and the in-
structions refused on behalf of appellant. The court in [illegible]
tion given is not accurate. To its not, in terms, [illegible]
probable cause but attempted to tell the jury what [illegible] [illegible]
circumstances a verdict should be rendered against [illegible]. It
directed a verdict but ignored all inferences to [illegible] [illegible]
tory negligence on which appellee might be guilty. It also
told the jury what they should do if they believed that appellee
had proved his case by a preponderance of the evidence. It
failed to refer to the defendant's [illegible] so that the jury
what cause of action appellee was entitled to [illegible]. The second
and fifth instructions told the jury that the burden, if any,
should be carried upon all the [illegible] [illegible] [illegible]
evidence. In Krauskopf vs. [illegible], Ohio [illegible] [illegible]
167 III. [illegible] pp., 167 on page 179 the court [illegible]
number five for appellee stated that in determining the [illegible]
of damages appellee was entitled to recover in this case, the
jury had the right to, and should take into consideration
all the facts and circumstances, as proved in the evidence bearing
them. The instruction does not specifically state the law,
and is subject to some of the same objections as those from
above mentioned. In determining the amount of [illegible] the

jury should only consider such evidence as properly and legally bear upon the question of such damages." In Ferreira vs. Diller, 176 Ill. App. 447, it was held erroneous to instruct the jury to take into consideration the effect of an injury on a child's physical ability for the reason that the parent is entitled to his wages until he arrives at legal age. The first instruction refused was covered by the second given on behalf of the appellant. The court might properly have given some of the other five refused instructions but it will not be necessary to consider them in detail. Six instructions were given on behalf of appellant and they covered most every proposition of law applicable to the case.

For the errors indicated the judgment will be reversed and the cause will be remanded.

Reversed and Remanded.

they can be only consider such evidence as proper, and logically lead upon the question of such damages." In Kennedy vs. Dallas, 190 Ill. 490-497, it was held economic to instruct the jury to take into consideration the interest in an injury on a child's physical ability for the reason that the parent is entitled to his wages until he arrives at legal age. The first instruction refused was covered by the second given on behalf of the appellant. The sole rights properly in no given some of the other five refused instructions but it will not be necessary to consider them in detail. The instructions were given on behalf of appellant was they covered most every proposition on law applicable to the case.

For the errors indicated the judgment will be reversed and the cause will be remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson

Clerk of the Appellate Court.

6941

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on 27 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6947. Agenda #48.

Charles E. Bartlett, Administrator of the estate of Elizabeth Ann Bartlett, deceased, Appellee,	)	
Vs.	)	Appeal from the Circuit Court of Knox County.
Frank S. Bartlett, Appellant.	)	

Partlow, J.

Appellee, Charles E. Bartlett, administrator of the estate of Elizabeth Ann Bartlett, deceased, filed his bill in the circuit court of Knox County against appellant, Frank S. Bartlett, to compel appellant to assign and deliver to appellee certain shares of stock belonging to the deceased in her lifetime. Upon a hearing a decree was rendered in accordance with the prayer of the bill and this appeal was prosecuted.

The error urged is that the decree is not supported by the law or the evidence. Elizabeth Ann Bartlett died in Knox county, January 13, 1920, leaving surviving her the appellee, Charles E. Bartlett, her son and only heir at law. The appellant Frank S. Bartlett, was her step-son, being the son of her deceased husband by a former wife. On January 21, 1920, appellee was appointed administrator of the estate. Appellant, as far back as 1908, was the secretary of the Mutual Loan and Building Association of Galesburg, Illinois, and had for many years looked after the financial affairs and investments of his step-mother. He received from her, from time to time, various sums of money some of which was paid out by him and some was invested in the stock of

of the estate of Elizabeth Van Zerlett-

Vs.

Jerry and the
Elizabeth Lamp of
"Lamp Shades"

of the estate, of Elizabeth Van Zerlett, deceased, filed her
[illegible]
Frank S. Zerlett, to compel appellant to assign and deliver
to appellee certain shares of stock belonging to the deceased
in her lifetime. Upon a hearing [illegible] was entered in
accordance with the prayer of the bill [illegible]
[illegible]ated.

The error urged is that the decree is not
[illegible] by the law or the evidence. [illegible] Zerlett
[illegible] the appellee, Ethelyn L. Zerlett, her son and only child
[illegible]. The complainant Frank S. Zerlett, was her husband,
[illegible] the son of her deceased husband by a former wife. On
[illegible] 2, 1920, appellee was deposited a [illegible] number of [illegible]
[illegible]. Apparently, on her book as "[illegible]", was the secretary
of the [illegible] Loan and Building Association of Cleveland,
[illegible], and had for many years looked after the financial
[illegible] investments of his step-mother. He received from
her, [illegible] time to time, [illegible]
[illegible]

the building association, of which appellant was the secretary. On January 2I, I909, appellant, in the presence of Arthur J. Edgar, presented to the deceased a written statement signed by him showing all of the financial transactions of appellant with the funds of Mrs. Bartlett. He there stated that he wanted Mr. Edgar to keep the paper so that if anything happened, either to appellant or his step-mother that some third person would know the condition of her financial affairs. This statement showed the total cash received during I908 was $3I57.50; that appellant had paid out of this amount $I400.00 to W.R. Labar and had invested a part of the balance in the stock of the building association. This stock was in three certificates or books. One was Pass Book I58 for $I98.7I, purchased December 27, I908. Another was Pass Book 787 for $720.66, purchased January II, I909, and the third was Pass Book 375 for $636.08, purchased January I6, I909, which is also referred to in the evidence as Certificate of Stock No. I2. Pass Book I58 seems to have been disposed of prior to Mrs. Bartlett's death and is not in controversy in this case. The other two certificates remained in the hands of appellant until the death of Mrs. Bartlett and it was for the purpose of securing these pass books and these two certificates that the bill in this case was filed.

Appellant refused to turn over this stock to appellee on the ground that Mrs. Bartlett, during her lifetime, made him a present of it and he was the owner thereof. The contention of appellant is that Certificate No. 787 was purchased by appellant on January II, I909, and Certificate No. I2 was purchased on January I6, I909, and both were originally assigned to the appellant and as there was nothing on the records of the

the building association, of which appellant was the secretary. On January 21, 1909, appellant, by his agent, John L. Edgar, presented to the Secretary a written agreement signed by him showing all of the financial transactions on a settlement with the family of Mrs. Bartlett. He then stated that he wanted Mr. Edgar to keep the paper so that his employing company, either to appellant or his step-mother that some trusted person would know the condition of her financial affairs. This statement showed the total cash received during 1908 was $3187.50; that appellant had paid out of this amount $1500.00 to W.R. Baker and had invested the balance in the stock of the building association. This stock was in three certificates on books, one was Book 136 for $555.71, purchased December 27, 1906. Another was Book 197 for $750.66, purchased January 11, 1907, and the third was Book 372 for $656.08, purchased January 16, 1908, which is also referred to in the evidence as certificate or stock No. 11. Pass Book 136 seems to have been dispersed of prior to Mrs. Bartlett's death and is not in controversy in this case. The other two certificates remained in the hands of appellant until the death of Mrs. Bartlett and it was not the purpose of securing these pass books and the two certificates that the bill in this case was filed.

Appellant refused to turn over the stock to appellee on the ground that Mrs. Bartlett, during her lifetime, made him a present of it and he was the owner thereof. The contention of appellant is that certificate No. 197 was assigned by appellant on January 11, 1909, and certificate No. 11 was purchased on January 16, 1908, and both were endorsed, assigned to the appellant and as there was nothing on the records of the

building association to show that the certificates were not owned absolutely by the appellant, and in order that there might be some record ro memoranda to show who was the real owner, he prepared the statement of January 21, 1909, and delivered it to Mr. Edgar. He claims that these certificates being in his name, it was not necessary in order to constitute a valid gift to have the certificates turned over to Mrs. Bartlett and then turned back to the appellant. All the law required to constitute a valid gift was some declaration on the part of the donor.

The original certificates, Nos. 375 and 787, have been certified to this court for inspection together with the two pass books issued on these certificates. No. 375 was originally issued on December 17, 1907, to Alex Henderson and was assigned on the back January 16, 1909, No. 787 was originally issued on August 2, 1905, to L. Swisegood and was assigned on January 11, 1909. The contention of appellant that both of these certificates were originally assigned to him is not sustained by the evidence. Both certificates plainly show that they were assigned by the original holders to Elizabeth A. Bartlett. The words Elizabeth A. Have been erased and the words Frank S. have been written in their place. The erasure is visible to the naked eye and does not require a glass to reveal it. In fact on Nos. 375 almost the entire name as originally written is visible and the lower part of the "z" in Elizabeth has not been erased at all. Both certificates are signed by Frank S. Bartlett as secretary of the building association and if we are any judge of handwriting the words Frank S. as they appear in the assignments are in the same handwriting as the signature of appellant to the certificate. Both pass books, on the first page of the cover, have pasted over the place where the name of the owner

building association to show that the certificates were not owned absolutely by the appellant, and to order that there might be some record so necessary to show who the real owner is. In compared the statement of January 1, 1908, and delivered it to Mr. Edgar. He claims that these certificates belong to his mamo, it was not necessary in order to complete a valid gift to have the certificates turned over to him. Therefore and then turned back to the appellant. All the requirements to constitute a valid gift was some testimonium on the part of the donor.

The original certificates, Nos. 1[illegible] and 1[illegible], have been certified to which court not known. Therefore with the two pass books issued on these certificates. No. 2[illegible] was originally issued on December 1[illegible], 1907, to [illegible] and was assigned on the back January 1[illegible], 1908. No. 1[illegible] was originally issued on August 8, 1908, to T. [illegible] and was assigned on January 1[illegible], 1909. The contention of appellant that both of these certificates were originally assigned to him is not sustained by the evidence. [illegible] certificates plainly show that they were assigned to the original holders to Elizabeth [illegible]. The [illegible] have been erased and the words Israel S. have been written in their place. The erasure is visible to the naked eye and does not require a glass to reveal it. In each of them, the [illegible] the entire name is originally written in violets and the [illegible] part of the "S" in Elizabeth has not been erased. All. both certificates are signed by Israel [illegible]. Testimony in regard to of the building association was in the [illegible] of handwriting the words Israel S. on the [illegible] in the [illegible] handwriting on the signature of appellant to the certificate. Both pass books, on the first page of the cover, have pasted over the place where the name of the owner

should appear a piece of paper three inches long and one and one-half inches wide, and printed on this paper is the following: "F. S. Bartlett, Insurance, 4 S. Cherry Street, Galesburg, Illinois." There was some writing under this strip of paper and part of it may be seen both above and below the space where the strip is pasted. Because of the fact that there has been a change in the name of the assignee of the certificates we are led strongly to infer that a similiar change has been made on the first page of the cover of the pass books. We think the evidence conclusively shows that these two certificates were purchased with the money of Mrs. Bartlett and the original assignments were taken in her name. There is no evidence to show how or by whom the erasure was made and appellant's name was substituted.

The evidence is not sufficient to show a gift of this stock to appellant. In fact the only evidence on this point, outside of the certificates themselves, was the testimony of William A. Bartlett, a son of the appellant. He testified that in July, 1918, in Galesburg, he had a talk with Elizabeth A. Bartlett , who was at the house of the witness. He took her for an automobile ride and they drove past a new house the witness was building and Mrs. Bartlett said she would certainly like to live there with the witness. He replied that if she would give him that $3,000 she had in the loan association he would take care of her as long as she lived, He testified that she said "I can't do that, Will, because I have already given all that money to your father."

This is the only evidence upon which appellant's claim of the gift is based. It falls far short of showing a gift. Appellant was the confidential adviser and business agent of Elizabeth A. Bartlett. A gift to a fiduciary can be

shown only by clear and convincing proof. Such a donee must prove affirmatively his good faith and the donor's independent action in order to overcome the legal presumption of undue influence. It is a universal rule, founded upon public policy, that where a confidential relation exists, if a gift is made to the person in whom confidence is reposed by reason of the relation, it is prima facie voidable. The law will presume from the mere existence of the relation that the gift was obtained by undue influence or improper means, and the burden of proof rests upon the donee to show that it was the free and voluntary act of the donor. Thomas vs. Whitney, 186 Ill., 225, Dowie vs. Driscoll, 203 Ill., 480; Gilmore vs. Lee, 237 Ill., 402.

Many cases are cited by appellant in support of his contention that no particular form or ceremony is necessary to constitute a delivery; that all the law requires to make a valid gift is some declaration of such gift on the part of the donor; that the assignment of a writing, upon delivery, constitutes a valid gift, and that the true test is the intention of the donor. All of the authorities cited have no application because the evidence is not sufficient to bring this alleged gift within any of the rules of law here announced, even conceding that all of them as stated are correct. The chancellor correctly found that there was no gift, they belonged to Mrs. Bartlett.

Appellee offered in evidence a book account, purporting to contain a complete record of the financial transactions of appellant with the funds of Mrs. Bartlett, together with certain checks and stubs, representing certain expenditures by him on this account. He attempted to testify to the correctness of these exhibits and that the book account was made as provided by statute. The court sustained an

shown only by clear and convincing proof. [illegible] must prove affirmatively his good faith in the acquire's innocent action in order to overcome the legal presumption of undue influence. It is a substantial rule, however, upon public policy, that where a confidential relationship exists, if a gift is made to the person in the confidence by reason of the relation, it is [illegible] voidable. The law will presume from the mere existence of the relation that the gift was obtained by undue influence or abuse of power, and the burden of proof is on the donee to show that it was the free and voluntary act of the donor.

Thomas vs. Whitney, 185 Ill., 403; Davis vs. Dodsall, 4[illegible] Ill., [illegible]; [illegible], [illegible].

Many cases are cited [illegible] contention is on [illegible] of his contention, that no relation from or confidency is necessary to constitute a fiduciary; that all the law requires to make a valid gift is some confidential or good gift on the part of the donor; that the contention of a [illegible], upon delivery, constitutes a valid gift, and that the [illegible] is the intention of the donor. All of the [illegible] cited have no application because the evidence in each [illegible] tends to bring this alleged gift within the rule [illegible] of low and unknown, upon considering that [illegible] are correct. The contention correctly states that there was no gift, they belonged to [illegible].

Appellee refers it evidence a good account, [illegible] to contain [illegible] and of the time that transactions of appellant with [illegible], [illegible], together with certain [illegible], representing certain expenditures by him on his account. No attempt to verify to the correctness of these exhibits and that the last account was made up provided by [illegible]. The court [illegible] on

objection to this testimony on the ground that he was an incompetent witness and this ruling is assigned to error. Section 2, Chapter 5I, Hurd's Statutes, I9I9, page I486, provides that no party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf, when any adverse party dues or defends as executor, administrator, etc., unless when called as a witness by such adverse party so suing or defending. The only evidence offered for the purpose of showing that this book account was admissable under the statute was the testimony of appellant. Appellee was suing as administrator, therefore, appellant, under Section 2, Chapter 5I, was not a competent witness. Even if he had been a competent witness and the book account had been proven as provided by statute, its contents was merely a self-serving statement by appellant, was not against his interest, but was in his favor. The objection to appellant's evidence was properly sustained.

The court refused to permit appellant to testify to the conversation at the home of Mrs. Bartlett on January 2I, I909, when Mr. Edgar was present, relative to the written statement delivered by appellant to Mr. Edgar. This evidence was clearly incompetent. Section 2, Chapter 5I of the Statute has four exceptions, and the fourth provides that where any witness, not a party to a suit, shall testify to any conversation or admission by an adverse party or parties in interest, occuring before the death and in the absence of such deceased person, then such adverse party may testify to such admission or conversation. The only conversation to which an adverse party may testify is a conversation or admission which other witnesses have testified to, and is not the conversation or admission made by the deceased person. The appellant could only be competent to testify to such ad-

competent witness and thus making it [illegible] to [illegible]

[illegible] provided that no party to any civil action, suit or [illegible] or person directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf, when any adverse party sues or defends as executor, administrator, etc., unless when called as a witness by such adverse party to testify or defending. The only evidence offered for the purpose of showing that this book account was admissible under the statute was the testimony of [illegible] - lant.

[illegible] appellant, under section 3, Chapter 32, was not a competent witness. Even if he had been a competent witness and the book account had been proven as provided by statute, his testimony was merely a self-serving statement by appellant, was not against his interest, but was in his favor. The objection to appellant's evidence was properly sustained.

The court refused to permit appellant to testify to the conversation at the home of [illegible], [illegible] 21, 1909, when Mr. Edgar was present, relative to the [illegible] statement delivered by appellant to Mr. Edgar. This evidence was clearly incompetent. Section 3, Chapter 32 of the Statute has four exceptions, and the fourth provides that where any witness, not a party to a suit, shall testify to any conversation or admission by an adverse party or person in an interest, occurring before the death and in the presence of such deceased person, then such adverse party may be a competent such admission or conversation. The only conversation to which an adverse party may testify is a conversation or admission which other witnesses have testified to, and is not the conversation or admission made by the deceased person. The appellant could only be competent to testify to such

missions or conversations made before her death and out of the presence of the deceased. Mrs. Bartlett was living and present at the time of this conversation between the appellant, Mrs, Bartlett and Mr. Edgar. The conversation did not come within exception four of the statute and the objection was properly sustained.

We find no reversible error and the decree was sustained.

Judgement Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson
Clerk of the Appellate Court.

6747

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on NOV 1921 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6949. Agenda #49.

Armour & Company, a corporation, Appellant, Vs, Swift & Company, Illinois Meat Company, Arnold Brothers, Inc., and Jourdan Packing Company, Appellees.	Appeal from City Court of Aurora, Illinois.

222 I.A. 667

Partlow, J.

Appellant, Armour & Company, has prosecuted this appeal from a judgement of the city of Aurora, ordering the distribution of certain funds in the hands of the clerk of that court among various attaching creditors.

John Martin was enggged in the retail meat business in the back part of the grocery store of Arthur Buttrey, in Aurora, Illinois. On April 2, 1920, Buttrey entered into a contract with Martin to purhase the stock and fixtures for $864.69. Buttrey received from Martin an affidavit containing a list of Martin's creditors, their addresses and the amount due each. The next day Buttrey mailed to each creditor a notice stating that he had purchased the stock and that the consideration would be paid on April 8, 1920.

Armour & Company was a creditor of Martin, and on April 1, 1920, Martin gave a check to Armour & Company on the Aurora National Bank, for $353.00 in part payment of his account, which check was returned on April 7, payment there of having been refused.

No. 5249. Opinion filed.

Appeal from City Court of Aurora, Illinois.

Aurora & Company, a corporation,

Appellant,

vs.

Smith & Company, Illinois Bank Company, Arnold Brothers, Inc., and American Leather Company,

Appellees.

Martin, J.

Appellant, Aurora & Company, has prosecuted this appeal from a judgment of the city of Aurora, ordering the distribution of certain funds in the hands of the clerk of that court among various attaching creditors.

John Martin was engaged in the retail meat business in the back part of the grocery store of Arthur Buttney, in Aurora, Illinois. On April 2, 1920, Buttney entered into a contract with Martin to purchase the stock and fixtures for $885.00. Buttney received from Martin an affidavit containing a list of Martin's creditors, their addresses and the amount due each. The next day Buttney mailed to each creditor a notice stating that he had purchased the stock and that the consideration would be paid on April 5, 1920.

Aurora & Company was a creditor of Martin, and on April 1, 1920, Martin gave a check to Aurora & Company on the Aurora National Bank, for $888.00 in part payment of his account, which check was returned on April 7, payment thereof having been refused.

On the same day Armour & Company received the notice from Buttrey that he had purchased the stock of Martin, and immediately Armour & Company began a suit in attachment in the city of Aurora against Martin, and Buttrey was summonsed as garnishee. Judgment was rendered on July I2, in favor of Armour & Company in that suit for $67I.99. Various other suits were commenced in attachment in the city court of Aurora by other creditors and in each case Buttrey was summonsed as garnishee. All of these suits were to the June term of the city court and judgments in all of them were entered at the June term, except the judgment of Swift & Company, which was entered at the September term. The judgments are as follows: Swift & Company, suit commenced April 22, I920, and judgment rendered October 4, I920, for $307.60; Arnold & Company, suit commenced June I5, I920, and judgment rendered July I2, I920, for $2I0.I4; Illinois Meat Company, suit commenced June I5, I920, and judgment rendered July I2, I920, for $42.70; Jourdan Packing Company suit commenced June 22, I920, and judgment rendered July I2, I920, for $I2.I4.

On motion of the Garnishee all of the attachments suits were consolidated, and the garnishee filed an answer in each case admitting an indebtedness of $854.69. An order was entered directing the garnishee to pay the amount due from him to the clerk of the court, which was done, Armour & Company then filed its petition claiming a preference in the fund by reason of its diligence in having attached the fund in the hands of the garnishee before payment thereof to Martin. Upon a hearing the court denied the petition and ordered the fund paid to all the creditors pro rata and

On the same day Amount & Company received the notice from Buttery that he had purchased the stock of Martin, and immediately Amount & Company began a suit in attachment in the city of Amore against Martin, and Buttery was summoned as garnishee. Judgment was rendered on July 12, in favor of Amount & Company in that suit for $671.39. Various other suits were commenced in attachment in the city court of Amore by other creditors and in each case Buttery was summoned as garnishee. All of these suits were to the June term of the city court and judgments in all of them were entered at the June term, except the judgment of Swift & Company, which was entered at the September term. The judgments are as follows: Swift & Company, suit commenced April 22, 1920, and judgment rendered October 4, 1920, for $807.50; [illegible] & Company, suit commenced June 16, 1920, and judgment rendered June 12, 1920, for $[illegible]; [illegible] Company, suit commenced June 15, 1920, and judgment rendered July 12, 1920, for $42.70; Bonham Packing Company suit commenced June 21, 1920, and judgment rendered [illegible] 12, [illegible], for $12.14.

On motion of the garnishee all of the attachments suits were consolidated, and the garnishee filed an answer in each case admitting an indebtedness of $954.69. An order was entered directing the garnishee to pay the amount due from him to the clerk of the court, which was done. Amount & Company then filed its petition claiming a preference in the fund by reason of its diligence in having attached the fund in the hands of the garnishee before payment thereof to Martin. Upon a hearing the court denied the petition and ordered the fund paid to all the creditors pro rata and

from the order this appeal was prosecuted.

It seems to be conceded by all the parties that the Bulk Sales Act was complied with in every respect and that such compliance vested Buttrey with the legal title to the property. In fact none of the attachments were against the stock or fixtures, but against the fund in the hands of Buttrey as garnishee. If the statute had not been complied with the same would have been void as to creditors. Even though the sale was valid and not fraudulent as to Buttrey it might have been a fraud upon the part of Martin, and might have been an attempt on his part to defraud his creditors and thus subject him and his property to the provisions of the attachment statute.

Section 37, Chapter II (Hurd's Statutes, 1919, page 114) provides that all judgments in attachment against the same defendant at the same term of court shall share pro rata according to the amount of the several judgments, but that where the property is attached while the defendant is removing same or after the same has been removed from the county and the same is overtaken or returned, or while the same is secreted by the defendant, or put out of his hands for the purpose of defrauding his creditors, the court may allow the creditor through whose diligence the same shall have been secured, a priority over the attachment or judgment creditors.

It is undoubtedly the purpose of this section to reward the diligence as contended by the appellant and has been held in Lyon vs. Robbins, 46 Ill., 276; Rappleye vs. International Bank, 93 Ill., 396; McVeagh vs. Roysten, 172 Ill., 515. The question in this case, however, is whether appellant has brought itself within the provisions of section 37, Under that section preference is only given to the diligent creditor, first, in case the defendant has removed

from the order this appeal was prosecuted.

It seems to be conceded by all the parties that the Bulk Sales Act was complied with in every respect and that such compliance vested Buttery with the legal title to the property. In fact none of the attachments were against the stock or fixtures, but against the fund in the hands of Buttery as garnishee. If the statute had not been complied with the sale would have been void as to creditors. Even though the sale was valid and not fraudulent as to Buttery it might have been a fraud upon the part of Martin, and might have been an attempt on his part to defraud his creditors and thus subject him and his property to the provisions of the attachment statute.

Section 27, Chapter II (Hurd's Statutes, 1919, page 114) provides that all judgments in attachment against the same defendant at the same term of court shall share pro rata according to the amount of the several judgments, but that where the property is attached while in the defendant's possession and the same or after the same has been removed from the county and the same is overtaken or returned, or while the same is secreted by the defendant, or put out of his hands for the purpose of defrauding his creditors, the court may allow the creditor [illegible] a priority over the attachment or judgment creditors.

It is undoubtedly the purpose of this section to reward the diligence as contended by the appellant and has been held in Lyon vs. Robbins, 46 Ill., 276; Hopkins vs. International Bank, 95 Ill., 396; McVaugh vs. Hopkins, 178 Ill., 316. The question in this case, however, is whether appellant has brought itself within the provisions of section 27. Under that section preference is only given to the diligent creditor, first, in case the defendant has removed

property, or after the same has been removed from the county and the same is overtaken and returned; second, where the property is secreted by the defendant, and, third, where the property is put out of his hands for the purpose of defrauding his creditors. In this case Martin was not removing the property, and it had not been removed from the county and overtaken and returned, and the property had not been secreted by Martin. The only part of section 37 which could possibly be applicable to this case is the last one, that Martin was putting his property out of his hands to defraud his creditors.

Section I, Chapter II provides nine specific grounds of attachment, only three of which are specified under section 37 as grounds for priority. The affidavit of appellant for the attachment in this case was apparently made out on a printed blank, which enumerates all of the grounds provided in section one. The judgment of appellant in the attachment is not a part of the record in this case, and we are unable to tell upon what one or more of the specific grounds provided in section one the judgment in attachment was based. If the judgment in attachment was based upon the specific ground that Martin was putting his property out of his hands to defraud his creditors, then appellant might be entitled to priority under section 37.

Buttrey testified that he was ready, able and willing to carry out his part of the contract of April 8, 1920, and he would have done so except for the service of the attachment writ upon him as the same was sued out by appellant. On April 1, 1920, Martin gave a fraudulent check to the appellant for a part of the account which he owed appellant. In the petition wherein appellant sought priority it was alleged that on April 7, 1920, after the date upon which appellant commenced its attachment suit, that the property of Martin had been put

property, or either the same has been removed from the county and the same is overtaken and returned; second, where the property is seized by the garnishment, and, third, where the property is put out of his hands for the purpose of defrauding his creditors. In this case Martin was not removing the property, and it had not been removed from the county and overtaken and returned, and the property had not been seized by Martin. The only part of section 37 which could possibly be applicable to this case is the last one, that Martin was putting his property out of his hands to defraud his creditors.

Section 1, Chapter II provides nine specific grounds of attachment, only three of which are specified under section 37 as grounds for priority. The affidavit or application for the attachment in this case was apparently made out on a printed blank, which summarizes all of the grounds provided in section one. The judgment of appellant in the attachment is not a part of the record in this case, and we are unable to tell upon what one or more of the specific grounds provided in section one the judgment in attachment was based. If the judgment in attachment was based upon the specific ground that Martin was putting his property out of his hands to defraud his creditors, then appellant might be entitled to priority under section 37.

Buttery testified that he was ready, able and willing to carry out his part of the contract of April 8, 1920, and he would have done so except for the service of the attachment writ upon him as the same was served out by appellant. On April 1, 1920, Martin gave a Kansas Bank check to the agent for a part of the account which he owed appellant. In the

on April 7, 1920, after the date upon which appellant commenced its attachment suit, that the property of Martin had been put

out of his hands for the purpose of defrauding his creditors and through the diligence of appellant the fund was made available to the appellant. Even conceding that there was ample allegations in the attachment proceeding that Martin was attempting to defraud his creditors, and conceding that the evidence shows that such was his purpose, and conceding that the petition for priority so alleged, all of these things were not sufficient to entitle the appellant to priority, for the reason that the court may have sustained the attachment on some of the six grounds for attachment not provided in section 37, and not on the ground that Martin was attempting to defraud his creditors. If the attachment was sustained on some ground not specified in section 37, appellant would not be entitled to priority. It should appear on what ground the attachment was rendered so that this court can determine the priority. In the absence of this affirmative showing we must conclude that the trial court made a correct order of distribution.

The judgement will be affirmed.

Judgement Affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson
Clerk of the Appellate Court.

6457

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

JUSTUS L. JOHNSON, Clerk.

CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

6959. Agenda #57.

E.L. Hardy, Appellee,	)	
Vs.	)	Appeal from the Circuit
I.W. George, Appellant.	)	Court of DeKalb County.

222 I.A. 667

Partlow, J.

Appellee, E.L. Hardy, obtained a judgement in the circuit court of DeKalb county against appellant, I.W. George, on a promissory note for $414.50 and from the judgement this appeal was prosecuted. The amended declaration contained a special count upon the note and the common counts. Appellant filed the general issue, and a special plea alleging that the consideration for the note was for money won by appellee from appellant in gambling on the grain market through the board of trade. Appellant also filed a plea of set-off in the sum of $4,000 for money won by appellee from appellant in similiar gambling transactions. A demurrer was sustained to the plea of set-off.

The first question for determining is whether the deals between the appellant and appellee constitute gambling transactions. Section 137 A., Chapter 38, Hurd's Statutes 1919, page 1020, provides that it shall be unlawful for any person to keep, within this state, any bucket shop wherein is conducted the pretended buying or selling of stock or grain without any intention of receiving and paying for the property so bought, or the delivery of the property so sold, or wherein is conducted the pretended buying or selling of such property on margins, or where the party buying such

H.H. Hardy, Appellee,	
vs.	
I.W. George, Appellant.	Court of DeKalb County.

Portlow, J.

Appellee, H.H. Hardy, obtained a judgement in the circuit court of DeKalb county against appellant, I.W. George, on a promissory note for $414.80 and from the judgement this appeal was prosecuted. The appellant assigned a special count upon the note and the common counts. Appellant filed the general issue, and a special plea alleging that the consideration for the note was for money won by appellee from appellant in gambling on the grain market through the board of trade. Appellant also filed a plea of set-off in the sum of $4,000 for money won by appellee from appellant in similar gambling transactions. A demurrer was sustained to the plea of set-off.

The first question for determining is whether the deals between the appellant and appellee constitute gambling transactions. Section 187 A., Chapter 38, Hurd's Statutes 1919, page 1020, provides that it shall be unlawful for any person to keep, within this state, any bucket shop wherein is conducted the pretended buying or selling of stock or grain without any intention of receiving and paying for the property so bought, or the delivery of the property so sold, or wherein is conducted the pretended buying or selling of such property on margins, or where the very basis and

property , or appearing to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold. Section I3I, Chapter 38 of the statute provides that all promissory notes, contracts and agreements made by any person where the whole or any part of the consideration shall be for any money won by any gambling shall be void and of no effect.

The evidence shows that the appellant lived in the vicinity of Shabbona, DeKalb County, on a farm of I60 acres, which had been purchased in I9I2 with money which his wife received from her father. On this farm were bins and cribs which would hold I500 bushels of small grain and 2,000 bushels of corn. Appellee lived in Shabbona, was a member of the Chicago board of trade and had an office up stairs over a store where he received quotations on grain and stock over a wire. His dalings were through Walter Fitch & Company on the Chicago board of trade. J.M. Kirby was in appellee's employ as an operator and bookkeeper.

In January, I9I2, appellant began to buy and sell grain on the Chicago board of trade through appellee and his dealings continued for about two years. During that time he bought 700,000 bushels of wheat, 600,000 bushels of corn, and 600,000 bushels of oats, valued at about $I,000,000. Appellant testified that he was buying on a margin, sometimes two cents, sometimes three cents, sometimes not any at all. As a result of these dealings, in December, I9I3, he owed appellee $4I4.00 and appellee demanded a settlement. In May, I9I4, appellee went to appellant's farm with the note in question and appellant signed it. Another note for $800.00 had been given for transactions before the note in question. Appellant testified that the consideration for the note was money he owed growing out of these deals on the

property, or appearing to buy the same, been not liable actually to receive the same if purchased, or to deliver the same if sold. Section 781, Chapter 38 of the statute provides that all promissory notes, contracts and agreements made by any person where the whole or any part of the consideration shall be for any money won by any gambling shall be void and of no effect.

The evidence shows that the appellant lived in the vicinity of Shabbona, DeKalb County, on a farm of 160 acres, which had been purchased in 1912 with money which his wife received from her father. On this farm were bins and cribs which would hold 1500 bushels of small grain and 3,000 bushels of corn. Appellee lived in Shabbona, was a member of the Chicago board of trade and had an office up stairs over a store where he received quotations on grain and stock over a wire. His dealings were through Walter Dixon & Company on the Chicago board of trade. J.M. Kirby was in appellee's employ as an operator and bookkeeper.

In January, 1912, appellant began to buy and sell grain on the Chicago board of trade through appellee and his dealings continued for about two years. During that time he bought 700,000 bushels of wheat, 600,000 bushels of corn, and 600,000 bushels of oats, valued at about $1,000,000. Appellant testified that he was buying on a margin, sometimes two cents, sometimes three cents, sometimes not any at all. As a result of these dealings, in December, 1912, he owed appellee $14,000 and [illegible]. In May, 1914, appellee went to appellant's farm with the note in question and appellant signed it. Another note for $800.00 had been given for transactions before. The note in question [illegible] appellee testified that the consideration for the note was money he owed growing out of these deals on the

board of trade. Appellee admitted, on cross-examination, that the note represented money appellant lost in purchasing and selling grain, but he testified that all of these deals were bona fide and that delivery was actually made in at least three or four of the transactions. These deliveries were made by putting 25,000 bushels of grain in a public warehouse in Chicago in appellee's name or in the name of Walter Fitch & Company. Appellee produced some statements of Walter Fitch & Company of the delivery of certain wheat, oats and corn in elevators in Chicago. Appellant denied any knowledge of the transactions to which these exhibits purported to relate and swore he never received any grain in any public elevator in Chicago. The evidence shows that in every instance these deals were closed out before the time of delivery and in some instances the grain sold almost immediately after it was purchased.

It is no doubt the law, as contended by appellee, that in order to establish these transactions as gambling contracts, it is necessary for appellant to prove by the clear preponderance of the evidence that they were mere option contracts and that it was the mutual understanding of both parties that there should be no delivery of receipt of grain. Riley vs. Lamson, 164 Ill. App., 297; Kerting vs. Sturtevant, 181 Ill. App., 517; Belouze vs. Slaughter, 241 Ill., 215. What the real intention of the parties was and whether the form was merely colorable and adopted for the purpose of covering up a series of gambling transactions is one of fact and must be determined from all the facts and circumstances of the case. First National Bank vs. Miller, 235 Ill., 135; Pratt & Company vs. Ashmore, 224 Ill., 587; Bartlett vs. Slusher, 215 Ill., 348; Campbell vs. McConnell,

board of trade. Appellee admitted, on cross-examination, that the note represented money appellee lost in speculating and nothing grain, but he testified that all of these lots were bona fide and that delivery was actually made in at least three or four of the transactions. These deliveries were made by putting 25,000 bushels of grain in a public warehouse in Chicago in appellee's name or in the name of Walter Fitch & Company. Appellee produced some statements of Walter Fitch & Company of the delivery of certain wheat, oats and corn in elevators in Chicago. Appellant denied any knowledge of the transactions to which these exhibits purported to relate and would be never received any grain in any public elevator in Chicago. The evidence showed that in every instance these cards were closed out before the time of delivery and in some instances the grain sold almost immediately after it was purchased.

It is no doubt the law, as contended by appellee, that in order to establish these transactions as gambling contracts, it is necessary for appellant to prove by the clear preponderance of the evidence that they were term option contracts and that it was the mutual understanding of both parties that there should be no delivery of receipts or grain. [illegible] Lawrence, 201 Ill. App. 177; [illegible] 201 Ill. App. 177; [illegible] 201 Ill., 216. Where the real intention of the parties was and whether the form was merely colorable and adopted for the purpose of covering up a series of gambling transactions is one of fact and must be determined from all the facts and circumstances of the case. [illegible] 236 Ill., 156; Pratt & Company vs. Sanborn, 224 Ill., 568;

214 Ill. App., 342.

At the time of these transactions appellant was a tenant farmer and was worth about $2,000. Later his wife received some money with which a farm of 116 acres was purchased, but this farm had a mortgage on it. Even after this property came into the hands of appellant and his wife they were only worth a few thousand dollars . Their farm had crib room for only 3500 bushels of grain. Appellant not only had no place to put this grain but he had no use for it. In spite of all these facts he purchased almost 2,000,000 bushels of grain worth almost $1,000,000. He never put up any money except margins and never called for the grain. None was ever delivered but each transaction was closed out almost immediately upon settlement of differences. It is not sufficient in the light of all of this evidence for appellee to say that the intention was to deliver and that appellant could have had the grain if he wanted it. Cases quite similiar to this one have been before the courts of this state on many occasions and several of them are cited above, and uniformly it has been held that transactions similiar to this are mere options or gambling transactions within the meaning of the statute. The actions of the parties speak louder than their words and the evidence amply shows that all of these transactions were in violation of the statute and were void. The mere fact that some grain was in the city of Chicago and that warehouse receipts were held therefor by one of the parties does not change the gambling character of this transaction. Pratt vs. Ashmore, 224 Ill., 587.

Appellant contends that the court improperly sustained a demurrer to the plea of set-off. This plea was based upon Section 132 of the Criminal Code which gives a right of action to the loser to recover back from the winner in a gambling transaction any money paid to him on account of

214 Ill. App., 242.

At the time of these transactions appellant was a tenant farmer and was worth about $2,000. Lester Nix who received some money with which a farm of 116 acres was purchased, but this farm had a mortgage on it. Even after this property came into the hands of appellant and his wife they were only worth a few thousand dollars. Their farm had room for only 8500 bushels of grain. Appellant now only had no place to put this grain but he had no use for it. In spite of all these facts he purchased almost 2,000,000 bushels of grain worth almost $1,000,000. He never put up any money except margins and never called for the grain. None was ever delivered but each transaction was closed out almost immediately upon settlement of differences. It is not sufficient in the light of all of this evidence for appellee to say that the intention was to deliver and that appellant could have had the grain if he wanted it. Cases quite similar to this one have been before the courts of this state on many occasions and several of them are cited above, and uniformly it has been held that transactions similar to this are mere options or gambling transactions within the meaning of the statute. The actions of the parties speak louder than their words and the evidence amply shows that all of these transactions were in violation of the statute and were void. The mere fact that some grain was in the city of Chicago and that warehouse receipts were held therefor by one of the parties does not change the gambling character of this transaction.

214 Ill., App.

Appellant contends that the court improperly sustained a demurrer to the plea of set-off. This plea was based upon Section 182 of the Criminal Code which gives a right of action to the loser to recover back from the winner in a gambling transaction any money paid to him on account of

any such transaction, but the action by virtue of this section must be brought within six months of the loss, and failure within such time to bring such action it is barred. In Holland vs. Swain, 94 Ill., I54, and Kizer vs. Walden, I98 Id., 274, it was held that the legal effect of this statute was to limit the time in which the loser can bring an action to six months after the supposed loss occurs. According to the bill of particulars it appears that the last loss for which appellant seeks to recover occured on November 2I, I9I3. The plea of set-off was filed on November 8, I9I9, practically six years after the supposed loss occured. Counsel for appellant, however, contends that even though appellant could not bring an action to recover a supposed loss on account of the lapse of six months, yet under Section I7, Chapter 83 of the statute (Hurd's Statutes, I9I9, page I904) he was entitled to his plea of set-off. This section provides that a defendant may plead a set-off or counter claim barred by the statute of limitations, while held or owned by him, to any action, the cause of which was owned by the plaintiff or the person under whom he claims, before such set-off or counter claim was barred, and not otherwise, provided, this section shall not effect the right of a bona fide assignee of a negotiable instrument assigned before due. This section is one of the sections of the general limitations law and applies only in so far as the sections of the statute of limitations are concerned. Appellant's cause of action for losses set up in his plea of the statute of limitations was under Section I32, Chapter 38 and was barred because the action was not brought within six months and the court properly sustained the demurrer to his pleas.

Appellant insists that the verdict was defective because the damages were assessed at $4I4.50 with interest

any such transaction, but the action by virtue of this section must be brought within six months of the loss, and failure within such time to bring such action it is barred. In Holland vs. Swain, 94 Ill., 164, and Minor vs. Wilson, 196 Ill., 274, it was held that the legal effect of this statute was to [illegible] the [illegible] month after the supposed loss occurs. According to the bill of particulars it appears that the last loss for which appellant seeks to recover occurred on November 21, 1918. The plea of set-off was filed on November 8, 1919, practically six years after the supposed loss occurred. Counsel for appellant, moreover, contends that even though appellant could not bring an action to recover a supposed loss on account of the lapse of six months, yet under Section IV, Chapter 83 of the statute (Hurd's statutes, 1919, page 1204) he was entitled to his plea of set-off. This section provides that a defendant may plead a set-off or counter claim barred by the statute of limitations, which held or owned by him, to any action, the cause of which was owned by the plaintiff or the person under whom he claims, before such set-off or counter claim was barred, and not otherwise, provided, this section shall not affect the right of a bona fide assignee of a negotiable instrument assigned before due. This section is one of the sections of the general limitations law and applies only in so far as the sections of the statute of limitations are concerned. Appellant's cause of action for losses not in his plea of the statute of limitations was under Section 183, Chapter 83 and was barred because the action was not brought within six months and the court properly sustained the demurrer to his plea.

Appellant insists that the verdict was defective because the damages were assessed at $414.30 with interest

from May, 1919, to date without specifying any rate of interest. As there was no cause of action and the judgement will have to be reversed, it will not be necessary to consider the question.

The judgement will be reversed with a finding of fact.

Judgement Reversed With Finding of Fact.

We find that the note in question in this case was given in payment of a gambling transaction and for that reason was void, and that appellee has no cause of action thereon which can be enforced in the courts.

from May, 1919, to date without specifying any rate of interest. As there was no cause of action and the judgment will have to be reversed, it will not be necessary to consider the question.

The judgment will be reversed with a finding of fact.

Judgment Reversed With Finding of Fact.

We find that the note in question in this case was given in payment of a gambling transaction and for that reason was void, and that appellee has no cause of action thereon which can be enforced in the courts.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson.
Clerk of the Appellate Court.

165

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the fourth day of October, in the year of our Lord one thousand nine hundred and twenty-one, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. NORMAN L. JONES, Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on NOV 3 1921 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Andrew McLeish, Bert Baxter, and Daniel B. Flanders, under the firm name of McLeish, Baxter & Flanders,	)	
Appellants,	)	Appeal from the County Court of Winnebago County.
vs.	)	
Clara A. Fitzgerald, Avis L. Fitzgerald and Eunice I. McFadden,	)	
Appellees.	)	

222 I.A. 667

Partlow, J.

Appellants, Andrew McLeish, Bert Baxter and Daniel B. Flanders, under the firm name of McLeish, Baxter and Flanders, began suit in the county court of Winnebago county against appellants, Clara A. Fitzgerald, Avis L. Fitzgerald and Eunice I. McFadden to recover a real estate commission for the sale of appellee's farm. There was a trial by jury, judgment for appellees and an appeal to this court where the judgment was reversed and the cause remanded, 218 Ill. App., 658. Upon the second trial, again there was a verdict and judgment for the appellees and this appeal was prosecuted.

Upon the former appeal we stated all of the facts in the case, considered every question raised, and held that the evidence showed that the appellants were entitled to their commission. It is claimed by appellants that the evidence on the second trial was substantially the same as on the first hearing and that claim is not disputed by appellees. We have examined the evidence and find that no new material evidence was presented on the second trial. We see no reason for changing the views

Andrew McGeath, Bert Baxter, and Daniel E. Flanders, under the firm name of McGeath, Baxter & Flanders,	
Appellants,	Appeal from the County Court of Winnebago County.
vs.	
Clara A. Fitzgerald, Avis L. Fitzgerald and Annie I. McGeath,	
Appellees.	

Bartlow, J.

Appellants, Andrew McGeath, Bert Baxter and Daniel E. Flanders, under the firm name of McGeath, Baxter and Flanders, began suit in the county court of Winnebago county against appellants, Clara A. Fitzgerald, Avis L. Fitzgerald and Annie I. McGeath to recover a real estate commission for the sale of appellees' farm. There was a trial by jury, judgment for appellees and an appeal to this court where the judgment was reversed and the cause remanded, 218 Ill. App., 588. Upon the second trial, again there was a verdict and judgment for the appellees and this appeal was prosecuted.

Upon the former appeal we stated all of the facts in the case, considered every question raised, and held that the evidence showed that the appellants were entitled to their commission. It is claimed by appellants that the evidence on the second trial was substantially the same as on the first hearing and that claim is not disputed by appellees. We have examined the evidence and find that no new material evidence was presented on the second trial. We see no reason for changing the views

expressed in our former opinion and the judgment is reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 3rd day of December in the year of our Lord one thousand nine hundred and twenty-one

Justus L. Johnson
Clerk of the Appellate Court.

104 - 25875

JOHN P. MAYER,
Plaintiff in Error,

vs.

SAMUEL A. STERN,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE DRIVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Superior court of Cook County against the defendants, Samuel A. Stern and one Immenhausen, for falsely and maliciously and without probable cause causing his arrest on process issued by the Municipal court of Chicago.

The plaintiff in his declaration charged that defendant had maliciously and without probable cause charged in an information that plaintiff on June 23, 1916, "falsely issued a statement and affidavit in violation of chapter 38, section 4, contrary to the form of the Statutes," etc.; that defendant procured a warrant for plaintiff's arrest, and that as a result the plaintiff was in prison for a period of twenty-four hours next following.

The record shows that on a first trial both defendants were found not guilty by verdict of a jury and that a new trial was allowed as to defendant Stern. At a later trial the trial Judge instructed the jury to find the defendant Stern not guilty. The jury complied with this instruction and a judgment was entered on the verdict in favor of the defendant, which the plaintiff seeks to reverse by appeal to this court.

A point is made on behalf of the plaintiff that section 4, paragraph 38, prohibits the sale by druggists, ex-

cept on written prescription, of certain kinds of drugs, and that the evidence shows that the plaintiff never committed any such offense. There is no merit in this point. The information upon which the warrant was issued charges the plaintiff with falsely issuing a statement and affidavit in violation of chapter 38, section 4-A, Hurd's Revised Statutes of 1913, which is what is commonly known as the Bulk Sales Act. In later editions of this publication, however, this chapter and section is changed to chapter 121-A, section 79. It is quite clear from the evidence before us that it was intended to charge the plaintiff in the information with a violation of the Bulk Sales Act, and this seems to have been the understanding of the Judge who issued the warrant, as well as of all the parties interested in the proceedings in the Municipal court.

The evidence introduced on the trial shows that the plaintiff sold a store to the defendant for $400 and that at the time of the sale the plaintiff well knew that there were judgments against him which constituted liens against the property sold. The evidence also discloses that after plaintiff's arrest he called at the office of defendant's attorneys and paid the sum of $164 to remove the lien of these judgments, and that when he made this payment he was informed that the proceedings taken against him in the Municipal court would be dismissed.

We think the evidence introduced on the trial fails to establish that the defendant acted either maliciously or without probable cause. It is true that technical error in charging the offense in the Municipal court appears and that the action there was dismissed for want of prosecution. These facts, however, in and of themselves are not sufficient to establish either malice

or want of probable cause. It is quite clear from the record that the plaintiff by delivering an affidavit to the defendant led defendant to believe that he was purchasing property free of liens and even though the parties in the transaction did not comply with all of the provisions of the Bulk Sales Law, the evidence shows that plaintiff had so acted in the matter as to give good ground for the belief in the mind of the defendant that he, defendant, was being grossly imposed upon. The evidence does not disclose that defendant acted with malice, but even if it did so, want of probable cause would not necessarily be inferred therefrom. Chapman vs. Cawrey, 56 Ill., 512.

The evidence discloses that plaintiff knew he was being prosecuted for a violation of the Bulk Sales Act, and he paid $164 to satisfy judgments which constituted liens against the store, and this sum was paid for the purpose of preventing a further prosecution of the charge pending against him.

We think when all the evidence is considered it proves that plaintiff paid this sum for the purpose of compromising the criminal action, and this being so, he cannot now maintain his action against defendant. By paying this amount plaintiff in effect admitted that defendant had probable cause for filing the charge against him in the Municipal court. Muhl v. Cohen, [illegible] Ill., 363; Buehl Bros. Brewing Co. v. Atlas Brewing Co., 137 Ill. App. 382.

The judgment of the Superior court is affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

171 - 25943

C. P. CURRAN, Jr.,
Appellee,

vs.

CARL THOGERSEN and HANS C. ERICKSEN, doing business as THOGERSEN and ERICKSEN,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 668

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiff, a real estate broker, brought an action in the Municipal court of Chicago against the defendants based upon a claim for commissions which the plaintiff asserts he is entitled to in that he was the procuring cause of an exchange of real estate located at the corner of Belden and Seminary avenues, Chicago, for premises known as No. 4738 to 4750, inclusive, North Spaulding avenue, Chicago.

It is charged in the statement of claim that the defendants on or about April 5, 1918, agreed to pay the plaintiff $2,500 for his services in the event that he produced a customer ready, able and willing to make an exchange of properties with defendants, and that plaintiff on April 26, 1918, did produce a customer who was ready and willing to consummate such exchange with defendants at a price and upon terms which had been mutually agreed upon between the owners of the respective properties.

In an affidavit of merits the defendants denied that they had at any time employed plaintiff to procure a sale or exchange of their North Spaulding avenue property, and they denied that they or either of them had agreed to pay the sum of $2500 or any other sum for his services, as alleged in the statement of claim. Defendants further denied that the plaintiff had ever procured a customer ready, able and willing to make an ex-

The plaintiff, a real estate broker, brought in action in the Municipal Court of Chicago against the defendants based upon a claim for commissions which the plaintiff asserts he is entitled to in that he was the procuring cause of an exchange of real estate located at the corner of Belden and Sheffield avenues, Chicago, for premises known as No. 4724 to 4728, inclusive, Berwyn Boulevard avenue, Chicago.

It is charged in the statement of claim that the defendants on or about April 8, 1919, agreed to pay the plaintiff $2,500 for his services in the event that he produced a purchaser ready, able and willing to make an exchange of properties with defendants, and that plaintiff on April 26, 1919, did produce a purchaser who was ready and willing to exchange his property with defendants at a price and upon terms which had been mutually agreed upon between the owners of the respective properties.

In an affidavit of merits the defendants denied that they had at any time employed plaintiff to procure a sale or exchange of their North Sheffield avenue property, and they denied that they or either of them had agreed to pay the sum of $2500 or any other sum for his services, as alleged in the statement of claim. Defendants further denied that the plaintiff had ever procured a purchaser ready, able and willing to make an ex-

change of properties, as charged. The defendants expressly set forth in their affidavit of merits that they had exchanged their Spaulding avenue property for the property located at Belden and Seminary avenues, known as the "Weigle property," through the efforts of another broker. A judgment was entered in the cause in favor of the plaintiff for the sum of $2500, and the defendants bring the case here by appeal for review.

The only question before us, then, is whether there is sufficient evidence in the record in support of the judgment.

There is direct contradiction between the witnesses who testified for the respective parties on material points. The evidence, however, tends to prove that defendants for some years prior to the month of April, 1918, had been engaged as contractors and builders; that they had built a great many apartment buildings in Chicago and had frequently employed real estate brokers in procuring their sale or exchange.

April 2, 1918, plaintiff, as broker, procured an exclusive written contract for the sale or exchange of the Weigle property, and on the 5th day of that month he exhibited the defendants' Spaulding avenue property to Mr. Weigle with a view to procuring an exchange thereof for Weigle's property.

Mr. Lublow, plaintiff's employe, testified that on April 5, 1918, he called Mr. Erickson, one of the defendants, on the telephone and stated to him that he had a party whom he had interested in a proposition to exchange property for defendants' premises, and that he, Mr. Erickson, agreed to call the following day to discuss the matter at plaintiff's office; that he, Mr. Lublow, prior to April 5, 1918, had obtained from one of the defendants information that defendants' property was for sale, with details as to incumbrances, etc., and that he had listed the property in plaintiff's office for sale; that on April 6th Mr. Erickson, one of the defendants, called at plaintiff's office;

change of procedure, as charged. The defendants apparently set forth in their affidavit of merits that they had authorized their appointing avenue property, for the property located at Dallas and Kearney avenues, known as the "Ralph property," through the efforts of another broker. A judgment was entered in the court in favor of the plaintiff for the sum of $[illegible], and the defendants bring the case here by appeal for review.

The only question before us, then, is whether there is sufficient evidence in the record in support of the judgment.

There is direct contradiction between the witnesses who testify for the respective parties on material points. The evidence, however, tends to show that initially in and prior prior to the month of April, 1919, had been engaged as partners and associates; that they had built a great many apartment buildings in Chicago and had financially employed that relation between themselves and as associates.

April 5, 1919, plaintiff, in Dallas, received an exclusive written authorization for the sale or exchange of the Ralph property, and on the 8th day of that month he established the defendants' appointing avenue property in Dallas with a view to effecting an exchange thereof for Ralph's property.

On Sunday, plaintiff's witness, testified that on April 6, 1919, he called Mr. Erickson, one of the defendants, on the telephone and stated to him that he had a party whom he had interested in a proposition to exchange property for defendants' property, and that he, Mr. Erickson, agreed to call the following day to discuss the matter in considerable detail; that Mr. Erickson, prior to April 8, 1919, had obtained from one of the defendants information and defendants' property was for sale, was unable as to income, etc., and that he had listed the property in plaintiff's office for sale; that on April 8th Erickson, one of the defendants, called at plaintiff's office;

that plaintiff then informed Mr. Bricksen that he had shown the Spaulding avenue property to the owner of the premises on Belden and Seminary avenues; that Mr. Bricksen replied that the latter property had been submitted to him before, in reponse to which plaintiff informed him that a Mr. Weigle, the then owner, had purchased the building from a Mr. Sullivan, and that he, Bricksen, evidently referred to the former owner, and that Mr. Bricksen replied, "Yes." It seems to be conceded that Mr. Bricksen stated that he had knowledge of the Belden avenue property which he had acquired from a former owner, Mr. Sullivan, and that it had been submitted to him by another broker. The evidence tends to show that during this interview Mr. Bricksen telephoned to his partner, Mr. Thogersen, and a meeting was arranged to take place between them and plaintiff that evening. Plaintiff's evidence tends to prove that Mr. Bricksen agreed to pay plaintiff $2500 as commission if he procured an exchange of defendants' property, and that plaintiff stated to Mr. Bricksen that Mr. Weigle had also agreed to pay a commission of 2½ per cent on the value of his property in the event that the deal was consummated.

Mr. Bricksen definitely contradicts in important particulars the testimony of Mr. Lublow and the plaintiff as to what occurred at plaintiff's office on the morning of April 6th. Plaintiff on the afternoon of that day again exhibited the property on Spaulding avenue to Mr. Weigle, who was accompanied by his wife. Plaintiff and Mr. Lublow met defendants at their office pursuant to the agreement made on the morning of April 6th, and they discussed at considerable length the terms on which a deal might be made for an exchange of the properties. There is evidence to the effect that the defendants at this evening conference expressed their willingness to make a trade of their property subject to an incumbrance of $73,700, for Weigle's

that plaintiff then informed Mr. Erickson that on the same day
adjoining unknown property to the owner of the premises on Yaldon
and Cassimmy avenues; that Mr. Erickson replied that the latter
property had been submitted to him before, in response to which
plaintiff informed him that a Mr. Volgia, the then owner, had
purchased the building from a Mr. Sullivan, and that he, Erickson,
additionally referred to the former owner, as that Mr. Sullivan.
replied, "Yes." It seems to be conceded that Mr. Erickson stated
that he had knowledge of the Holden avenue property which he had
acquired from a former owner, Mr. Sullivan, and that it had been
submitted to him by another broker. The evidence tends to show
that during that interview Mr. Erickson inquired in his parlour,
Mr. Cooperman, and a secretary was stationed in his room between
them and plaintiff that evening. Plaintiff's evidence tends to
prove that Mr. Erickson agreed to pay plaintiff $800 as commis-
sion if he procured an exchange of defendants' property, and that
plaintiff stated to Mr. Erickson that Mr. Volgia had also agreed
to pay a commission of 2½ per cent on the value of his property
in the event that the deal was consummated.

Mr. Cooperman definitely contradicts in material
particulars the testimony of Mr. Lubiow and the plaintiff as to
what occurred at plaintiff's office on the morning of April 6th.
Plaintiff on the afternoon of that day again submitted the prop-
erty on Spanking avenue to Mr. Volgia, who was accompanied by
his wife. Plaintiff and Mr. Lubiow met defendants at their
office pursuant to the agreement made on the morning of April
6th, and they discussed at considerable length the terms on which
a deal might be made for an exchange of the properties. There is
evidence on the effect that the defendants at this evening con-
ference expressed their willingness to make a trade of their
property subject to an incumbrance of $18,700, for Volgia's

property subject to an incumbrance of $8,000, or if they, defendants, could procure a mortgage on the Weigle property for $25,000 they would turn over the Spaulding avenue property subject to $70,000 incumbrance; that at this time both the plaintiff and Mr. Thogersen, defendant, stated that each would see what could be done about procuring a $25,000 mortgage on the Weigle property.

Further evidence introduced tends to show that following this evening conference the plaintiff and Mr. Rublow on April 9th again called on defendants and informed them that they could procure an $18,000 or $20,000 loan on the Weigle property; that defendants at this time insisted that they would not make a deal for less than $73,700 incumbrance on the Spaulding avenue property, subject to an incumbrance of $8,000 on the Weigle property; that a few days later the plaintiff informed defendants that Mr. Weigle refused to make the deal subject to $73,700 incumbrance, but that a deal could be made if the incumbrance on defendants' property was placed at $70,000.

The evidence further tends to prove that plaintiff or his employe saw defendants three or four times between the 10th of April and the 17th of April. Later in the month of April the defendants and Weigle agreed to a transfer of their respective properties. Weigle's property was to be subject to an incumbrance of $8,000 and defendants to an incumbrance of $73,700, and Weigle received in addition a cash payment of $2500. A contract was signed by the parties on April 25, 1910.

As stated above, the parties directly contradict each other in important particulars and the issues of fact were properly submitted to the jury which tried the case and which returned a verdict in favor of the plaintiff. If the testimony of the plaintiff and his witnesses be true, then the jury were justified in concluding that plaintiff was the procuring and efficient cause of

property subject to an incumbrance of $8,000, or if that, defendants, could procure a mortgage on the Weigle property for $8,000 they would turn over the Spaulding avenue property subject to $70,000 incumbrance; that at this time both the plaintiff and Mr. Thompson, defendant, stated that each would ver dar would be done about procuring a $8,000 mortgage on the Weigle property.

Further evidence introduced tends to show that following this evening conference the plaintiff and Mr. Indlow on April 8th again called on defendants and informed them that they could procure an $18,000 or $20,000 loan on the Weigle property; that defendants at a time thereafter that they would not make a deal for less than $23,500 incumbrance on the Spaulding avenue property, subject to an incumbrance of $8,000 on the Weigle property; that a few days later the plaintiff informed defendants that Mr. Weigle refused to make the deal subject to $23,500 incumbrance, but that a deal could be made if the incumbrance on defendants' property was raised to $25,000.

The evidence further tends to prove that plaintiff or his employe saw defendants three or four times between the 8th of April and the 17th of April. Later in the month of April the defendants and Weigle agreed to a transfer of their respective properties. Weigle's property was to be subject to an incumbrance of $8,000 and defendants to an incumbrance of $23,500, and Weigle received in addition a cash payment of $2000. A contract was signed by the parties on April 28, 1910.

As stated above, the parties directly concerned such other in important particulars and the issues of fact were properly submitted to the jury which tried the case and which returned a verdict in favor of the plaintiff. If the testimony of the plaintiff and his witnesses be true, then the jury were justified in concluding that plaintiff was the procuring and efficient cause of

the exchange of the properties. While the defendants expressly and definitely deny that they or either of them had ever made a promise to pay a commission of $250.00 to the plaintiff, this testimony is quite as definitely contradicted by the plaintiff and his witnesses. The testimony for the plaintiff does support the contention that the Weigle property was called to the defendants' attention, subsequent to its purchase by Weigle, by plaintiff, and the testimony of plaintiff and his witness tends to prove that plaintiff diligently followed up the first proposal for an exchange thereof until, mainly through his efforts, the negotiations were terminated in an agreement for exchange. On the record before us we are unable to say that the conclusion reached by the jury and the trial Judge is not supported by a preponderance of the evidence.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely and Hatchett, JJ., concur.

195 - 25967

ROBERT NOAK,
Appellant,

vs.

ROBERT SHANNON,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

222 I.A. 668

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of the defendant, Robert Shannon, entered in the Circuit court of Cook County.

The suit was originally brought before a justice of the peace and resulted in a judgment in favor of the plaintiff for $142.48. On appeal of this judgment to the Circuit court the case was tried before a jury and a verdict and judgment were rendered for the defendant. Evidence introduced on the trial shows that on July 31, 1917, plaintiff's automobile was being driven by his chauffeur in a southerly direction on Wilson street, Winnetka, Illinois. When it reached a point about twenty-five feet north of Willow street, an east and west street which intersects Wilson street, it collided with an auto truck owned by defendant. Plaintiff's son was riding in the automobile at the time the collision occurred, and he was the only witness who testified to circumstances attending the accident. The chauffeur, having left plaintiff's employ, was not produced as a witness.

Plaintiff's son testified by deposition that he was riding in his father's automobile in a southerly direction on Wilson street; that elevated railroad tracks are situated parallel with and on the west side of this street, the embankment being about fifteen feet high; that defendant's truck, which was

being driven in an easterly direction on Willow street, passed under the viaduct which extends over that street just west of its intersection with Wilson street, and turned in a northerly direction on Wilson street; that the truck "turned right in sharp toward the wrong side of the road, the left-hand side of the road." This witness testified that because of the elevation of the railroad tracks west of Wilson street the approaching truck could not be seen until it emerged from the subway under the tracks at Willow street; that as the truck turned in a northerly direction on Wilson street it was moving at a speed of about 15 miles an hour; that at the time of the collision plaintiff's automobile was about 20 feet from Wilson street and about 4 feet from the curb and was moving at about 8 or 10 miles an hour; that just before the collision occurred plaintiff's chauffeur "jammed on the accelerator to make the car go faster and swung around to the left to get out of the way of the truck, or we would have had a head on collision. Just as we did that the truck driver turned out at the same time and caught us in the rear fender on the right side back of the car."

A police officer employed by the Village of Winnetka testified that he arrived at the scene of the accident a few minutes after it occurred; that he noted the condition of the automobile and noticed the tracks of both machines; that the following day he examined the truck and that it carried license number 260244 Illinois 1917; that this number belonged on a Velie touring car; that he at the same time examined the brakes of the truck and found he could push one brake clear to the ground and that it didn't seem to take hold. This witness testified that Wilson street runs northeast and southwest and is 20 to 22 feet wide; that Willow street runs directly east

and west and is 25 or 30 feet wide; that the railroad embankment and viaduct structures at the intersection were so situated that the driver of a vehicle going east in Willow street under the viaduct and passing into Wilson street could not see traffic on the latter street until he was within three or four feet of the curb. The testimony of this witness with reference to tracks made by the automobile and the truck tends to corroborate the testimony of plaintiff's son.

A foreman for the defendant testified that a day or two after the accident occurred he examined the pavement at or near the scene of the accident, and that at that time he saw only a mark on the pavement which extended from the west side of the pavement over to the curbing.

On the record before us it must be held that the evidence shows that the accident was caused by the negligent conduct of the chauffeur in charge of the truck. Only one witness, as stated, testified to what occurred at the time the accident happened. The testimony of this witness, if true, shows that plaintiff's automobile was proceeding at a moderate speed in a southerly direction on the west side of Wilson street, and that it was struck and damaged by the truck, which the undisputed evidence shows had turned into Wilson street at a rate of speed of about 15 miles an hour. This undisputed evidence shows that the truck as it turned into Wilson street was driven close to the northwest corner of that street and Willow street, and that the driver failed to make a wide turn so that the truck, as it turned into Wilson street, could have passed on the east side of that street. In other words, the evidence shows that the driver of the truck negligently turned his vehicle into the west side of Wilson street at a considerable rate of speed without giving warning of his approach; and when note is made of the

fact that the walls which supported the viaduct were so situated as to obstruct his view of Wilson street, it must be held that his manner of operating the vehicle was negligent. Further, his conduct was in violation of Section 269 J Chapter 121, Roads and Bridges Act, Hurd's Revised Statutes of Illinois, which provides that where a motor vehicle is driven around a corner or curb in a public highway, where the operator's view of the road traffic is obstructed, at a rate of speed exceeding six miles an hour, such conduct is prima facie evidence that "the person operating such motor vehicle is running at a rate of speed greater than is reasonable," etc.

We do not think it can be said on the uncontradicted evidence that the driver of the automobile was guilty of contributory negligence. The evidence shows that he had but a moment to think and act. The embankment at the west side of Wilson street prevented escape in that direction. Under the circumstances to avoid a collision he could have turned in one direction only, to the left, and it is quite clear that in taking this direction he avoided what might have been a serious and perhaps a fatal accident.

It is our opinion that the verdict is manifestly against the weight of the evidence.

Other alleged errors complained of need not be considered except to say that it is our opinion that the trial court did not err in refusing to give instruction number 3 tendered on behalf of the plaintiff.

The judgment of the Circuit court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

221 - 25993

HELEN MEERSCHAERT,
Appellee,

vs.

ABRAHAM FRIEDMAN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

222 I.A. 668

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

In a declaration consisting of four counts the plaintiff charged that defendant by his servant negligently and carelessly operated and drove a truck in a northerly direction upon Greenview avenue where it crosses School street in Chicago as the plaintiff was riding in a west-bound automobile on School street; that by reason of such negligence the automobile in which plaintiff was riding collided with the truck and plaintiff thereby sustained injuries.

At the close of the taking of evidence in the case the court instructed the jury to disregard the fourth count, which alleged that the injury to plaintiff resulted from a reckless, wilful and wanton driving of the truck. A judgment was entered in the case in favor of plaintiff, on a verdict of a jury, for the sum of $2500. Defendant appeals.

The accident occurred about four o'clock in the afternoon on the 11th day of June, 1918, at the northwest corner of Greenview avenue and School street. Several witnesses testified both on behalf of the plaintiff and of the defendant to circumstances attending the collision.

The driver of the car in which the plaintiff was riding testified that there were seven persons in the car at the time of the accident; that the party had visited the home of one Art Russell, and that thereafter, accompanied by Russell, who

drove his own car, they visited a saloon on School street; that after the party left the saloon the car in which plaintiff was riding followed the Russell machine west on School street; that he, the witness, saw a truck coming south on Greenview avenue 40 or 50 feet from School street; that the truck was on the lefthand side of the street and was moving at a rate of from 20 to 25 miles an hour, and that it struck the automobile at the northwest corner of the two streets.

Witnesses on behalf of the defendant testified that the automobile in which plaintiff was riding was moving west on School street at the rate of from 20 to 25 miles an hour, and in this and in almost every other important particular there is direct and irreconcilable contradiction in the evidence. In view of the circumstances attending the accident and the serious conflict in the testimony, it was incumbent upon the trial court to correctly instruct the jury as to what duty the law imposed upon the plaintiff just before and at the time of the accident. The evidence shows that plaintiff was seated in the rear seat of the automobile directly behind the driver. It is in effect admitted that the negligence of the driver of the automobile, if any, could not legally be imputed to the plaintiff. The plaintiff was not, however, relieved of responsibility for her own conduct, nor was she excused from complying with the duty which the law imposed upon her to exercise ordinary care in looking out for her own safety. Flynn v. Chicago City Railway Co., 250 Ill. 460; Pienta v. Chicago City Railway Co., 284 Ill. 246; Fredericks v. Chicago City Railway Co., 208 Ill. App. 172. The law of this question is now settled by the cases above cited.

The trial court refused to give the following instruction as tendered by the defendant:

drove his own car, they yielded a nelson on Dodsel street; that after the party left the nelson the car in which plaintiff was riding followed the Russoll machine west on Dodsel street; that he, the nilsson, saw a truck coming south on Greenview avenue 40 or 50 feet from Dodsel street; that the truck was on the left-hand side of the street and was moving at a rate of from 20 to 25 miles an hour, and that it struck the automobile at the northwest corner of the two streets.

Witnesses on behalf of the defendant testified that the automobile in which plaintiff was riding was moving west on Dodsel street at the rate of from 20 to 25 miles an hour, and in this and in almost every other important particular there is direct and irreconcilable contradiction in the evidence. In view of the circumstances attending the accident and the serious conflict in the testimony, it was incumbent upon the trial court to correctly instruct the jury as to what duty the law imposed upon the plaintiff just before and at the time of the accident. The evidence shows that plaintiff was seated in the rear seat of the automobile directly behind the driver. It is in effect admitted that the negligence of the driver of the automobile, if any, could not legally be imputed to the plaintiff. The plaintiff was not, moreover, relieved of responsibility for her own conduct, nor was she excused from complying with the duty which the law imposed upon her to exercise ordinary care in looking out for her own safety. Illinois C. Railway Co. v. Phillips, 49 Ill. App. 179; Illinois Central Railway Co., 204 Ill. 244; Vandercook v. Chicago City Railway Co., 204 Ill. App. 172. The law of this question is now settled by the cases above cited.

The trial court refused to give the following instruction as tendered by the plaintiff:

"The court instructs the jury that while it is a general rule that where a person is riding merely as a passenger in a vehicle which is being driven by another, and where such passenger has nothing to do with its management or control that then the negligence of the driver of such vehicle cannot be imputed or charged to such mere passenger; but if the jury believe from the evidence in the case, and under the instructions of the court, that the plaintiff at and before the occurrence of the accident in question while riding in the automobile in question, knew or in the exercise of ordinary care would have known that the driver of said automobile was driving in a careless or negligent manner, providing you believe from the evidence that the driver of the pleasure car was operating said automobile in a careless and negligent manner, and that the plaintiff made no attempt to do anything for her own safety and protection, and did not warn or caution the driver of said pleasure car to desist from driving such pleasure car in a careless or negligent manner, then in such case you are instructed that if you believe from the evidence that she did so fail to warn and caution the driver in the manner aforesaid, and did so fail to do anything for her own safety and protection, and that such failure on her part, if you believe from the evidence she did so fail, was negligence on her part which caused or proximately contributed to cause the accident and alleged injury to herself, then she cannot recover in this case and you should find the defendant not guilty."

The court, however, read to the jury a modified form of the instruction. By the instruction as given the jury were told that if the jury believed from the evidence under the instructions of the court that the plaintiff at and before the happening of the accident did not exercise ordinary care for her own safety, or if she was guilty of negligence that contributed to cause her alleged injuries, she could not recover.

In the case of Pienta v. Chicago City Railway Co., supra, the trial court modified an instruction in substantially the same manner as that complained of in the present case. In its decision in that case the Supreme court said:

"The negligence of the driver in sole charge of a wagon cannot be imputed to another employee of the owner of the team who is riding on the wagon to assist in making delivery, and who, without any fault on his part is injured as a result of the combined negligence of the driver of a street car company. (Nonn v. C. C. Railway Co., 232 Ill. 378.) While this is true, yet it is also the duty of a mere passenger in a vehicle where he has an opportunity to learn of danger and avoid it, to warn the driver of the vehicle of such danger. A passenger has no right because someone else is

The court instructs the jury that while it is a general rule that where a person is riding solely as a passenger in a vehicle which is being driven by another, and where such passenger has nothing to do with the management or control that the negligence of the driver of such vehicle cannot be imputed or charged to such mere passenger; yet if the jury believe from the evidence in the case, and under the instructions of the court, that the plaintiff at the time of the occurrence of the accident in question while riding in the automobile in question, here or in the examples of contributory cause would have known that the driver of said automobile was driving in a careless or negligent manner, knowing you believe from the evidence that the driver of the plaintiff's car was operating said automobile in a careless and negligent manner, and that the plaintiff made no attempt to do anything for her own safety and protection, and did not warn or caution the driver of said vehicle or to desist from driving such automobile car in a careless or negligent manner, then in such case you are instructed that if you believe from the evidence that you did so fail to warn and caution the driver in the manner aforesaid, and did so fail to do anything for her own safety and protection, and that such failure on her part, if you believe from the evidence she did so fail, was negligence on her part which caused or proximately contributed to cause the accident and alleged injury to herself, then the answer recover in this case and you should find the defendants not guilty."

The court, however, read to the jury a modified form of the instruction. In the instruction as given the jury were told that if the jury believed from the evidence under the instructions of the court that the plaintiff at and before the happening of the accident did exercise ordinary care for her own safety, or if she was guilty of negligence that contributed to cause her alleged injuries, she could not recover.

In the case of Jones v. Kansas City Railway Co., supra, the trial court modified an instruction in substantially the same manner as that complained of in the present case. In the decision in that case the Supreme Court said:

"The negligence of the driver in only charge of a person cannot be imputed to another employee if one of the two who is riding as the reason to assist in making the injury, and who, without any fault of his part is injured as a result of the combined negligence of the driver of a street car company. (Young v. K. C. Railway Co., 225 Mo. 470.) While this is true, yet it is also the duty of a mere passenger in a vehicle where he has an opportunity to learn of danger and avoid it, to warn the driver of the vehicle of such danger. A passenger has no right because someone else is

driving the vehicle to omit reasonable and prudent efforts on his part to avoid the danger (citing among other cases Flynn v. Chicago City Railway, supra). We think this instruction as offered stated the law correctly and should not have been modified by the trial court. Its modification in the manner indicated we consider error."

The plaintiff testified that she saw the truck approachGreenview avenue when it was 30 to 40 feet from her; that it was then moving rapidly and that she did not give any warning to defendant of its approach. Whether plaintiff acted at the time with the care and caution which the law imposed upon her was a question, under the authorities cited, for determination by the jury, and there is some evidence in the record from which the jury might conclude that she had an opportunity to learn of the danger of the approaching truck and to avoid it by giving warning to the driver of the car in which she was riding. We hold, therefore, that it was error to modify the instruction tendered by the plaintiff.

The trial court also erred in refusing to give the instruction following tendered on behalf of the defendant:

"If you believe from the evidence that the plaintiff by using her faculties with ordinary and reasonable care in looking for danger, could have avoided injury on the occasion in question, and that she negligently failed to do so and thereby contributed to the accident, then plaintiff cannot recover."

This instruction expresses the law as held in the cases cited above.

Complaint is made that the court erred in giving certain instructions on behalf of the plaintiff. As we read these instructions they enunciate a correct principle of law. However, these instructions are lengthy, somewhat involved, and reiterate too frequently that the negligence of the driver of the automobile, if any, would not prevent a recovery by plaintiff if the jury believed from the evidence that the alleged injuries to plaintiff were proximately brought about by negligence

driving the vehicle so quite reasonable had gone to great efforts on his part to avoid the danger (citing among other cases Lynne v. Chicago City Railway, supra). He think this instruction to effect which the law correctly and should not have been modified by the trial court. The modification is the manner indicated no complaint error."

The plaintiff testified that she saw the truck approachdriveway some when it was 30 to 40 feet from her; that it was then moving rapidly but that she did not give any warning to defendant of its approach. Another plaintiff noted of the [illegible] and [illegible] [illegible] by the jury, and there is some evidence in the record from which the jury might conclude that she had an opportunity to learn of the danger of the approaching truck and to avoid it by giving warning to the driver of the car in which she was riding. We hold, therefore, that it was error to modify the instruction [illegible] by the plaintiff.

The trial court also erred in refusing to give the instruction following tendered on behalf of the defendant:

"If you believe from the evidence that the plaintiff by using her faculty with ordinary and reasonable care in looking for danger, could have avoided injury on the occasion in question, and that she negligently failed to do so and thereby contributed to the accident, then plaintiff cannot recover."

This instruction expresses the law as held in the cases cited above.

Complaint is made that the court erred in giving certain instructions on behalf of the plaintiff. As we read these instructions they enunciate a correct principle of law. However, these instructions are lengthy, numerous instructions, and relatively too frequently that the negligence of the driver of the automobile, if any, would not prevent a recovery by plaintiff if the jury believed from the evidence that the alleged injuries to plaintiff were proximately caused by negligence

of the defendant. The judgment must be reversed and the cause remanded for the error of the trial court in refusing to give the instructions above referred to tendered on behalf of the defendant.

The judgment of the Superior court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

349 - 26523

108a

JOHN S. VAN BERGEN,
Appellant,

vs.

FREDERICK W. RIES,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

December 30, 1919, a judgment was entered in the Municipal court of Chicago against Frederick W. Ries and A. C. Christiansen in favor of John S. Van Bergen.

February 9, 1920, Ries filed a petition in the Municipal court under which he sought a vacation of the judgment. The suit was commenced in the Municipal court April 1, 1916, nearly four years before the entry of the judgment. April 10, 1916, defendants Christiansen and Ries entered their appearance in the suit pro se and on this date an order was entered extending the time to file affidavits of merits. An affidavit of merits was filed by Ries on April 12, 1916, and April 22, 1916, an order of default was entered against Christiansen for want of an affidavit of merits. In the petition filed by Ries to vacate the judgment it is alleged inter alia that pending continuances of the cause in the Municipal court the plaintiff, Van Bergen, advised Ries that negotiations were being held between himself and Christiansen looking to a settlement of the claim; that June 18, 1916, a settlement was effected between Van Bergen and Christiansen in accordance with which Van Bergen had agreed to accept from Christiansen $400 in full settlement of the claim; that said $400 was to be paid $50 in cash and seven notes for $50 each, payable at thirty day intervals were to be given for the balance;

[illegible]

vs.

[illegible]

Appellee.

292 Ill. 668

DELIVERED THE OPINION OF THE COURT.

December 30, 1917, a judgment was entered in the Municipal court of Chicago against Frederick V. Rice and A. G. Christiansen in favor of John S. Van Bergen.

February 9, 1920, Rice filed a petition in the Municipal court under which he sought a vacation of the judgment. The suit was commenced in the Municipal court April 1, 1916, nearly four years before the entry of the judgment. April 10, 1916, defendants Christiansen and Rice filed their appearance in the suit yet no one on this date an order was entered extending the time to file affidavits of merits. An affidavit of merits was filed by Rice on April 18, 1916, and April 22, 1916, an order of default was entered against Christiansen for want of an affidavit of merits. In the petition filed by Rice to vacate the judgment it is alleged that pending continuance of the cause in the Municipal court the plaintiff, Van Bergen, advised Rice that negotiations were being had between himself and Christiansen looking to a settlement of the claim; that June 12, 1916, a settlement was effected between Van Bergen and Christiansen in accordance with which Van Bergen had agreed to accept from Christiansen $400 in full settlement of the claim; that said $400 was to be paid $50 in cash and seven notes for $50 each, payable at dates [illegible]

that the cash was paid and the notes executed and delivered; that within thirty days after the settlement was made Ries was advised by Van Bergen that he had settled the claim with Christiansen and that he, Ries, need pay no further attention to the matter.

The testimony introduced on behalf of Ries tends to show that Van Bergen had no legal claim of any sort against Ries; that Ries had never had any business dealings with Van Bergen and that the suit grew out of the unauthorized employment by Christiansen of Van Bergen, the plaintiff, an architect, to draw certain plans and specifications for a building to be erected by Ries.

March 5, 1920, the Municipal court overruled Van Bergen's motion to dismiss the petition and he was given leave to file an answer thereto, which answer was filed by him March 13, 1920. April 13, 1920, Van Bergen filed an amended answer in which he denied that he had advised Ries to pay no attention to the suit. June 19, 1920, upon a hearing the court ordered that the finding and judgment of December 30, 1919, be vacated and the cause reinstated, which order Van Bergen seeks to reverse by appeal to this court. Both Van Bergen and Ries appeared at the hearing and testified.

It will be unnecessary to discuss the merits of the original action in which judgment was entered in favor of Van-Bergen, except to say that the evidence submitted by Ries, if true, was sufficient to authorize a belief that he had a meritorious defense to the whole of plaintiff's claim against him.

The motion to vacate the judgment was not made until more than thirty days had elapsed after the entry of the judgment. It is conceded that under Section 21 of the Municipal Court Act

that the case was paid and the notes executed and delivered; that within thirty days after the settlement was made Miss Rice was married by Van Dorgen that he had settled the claim with Gherlebemson and that he, Rice, made no further objection to the matter.

The testimony introduced on behalf of Rice tends to show that Van Dorgen had no legal claim of any kind against Rice; that Rice had never had any business dealings with Van Dorgen and that the suit grew out of the unauthorized employment by Gherlebemson of Van Dorgen, the plaintiff, as solicitor, to draw certain plans and specifications for a building to be erected by Rice.

March 6, 1920, the Municipal Court overruled Van Dorgen's motion to dismiss the replies and he was given leave to file an answer thereto, which answer was filed by him March 15, 1920. April 15, 1920, Van Dorgen filed an amended answer in which he denied that he had advised Rice to pay no attention to his suit. June 19, 1920, upon a hearing the court ordered that the finding and judgment of December 30, 1919, be vacated and the cause reinstated, which order Van Dorgen seeks to reverse by appeal to this court. Both Van Dorgen and Rice appeared at the hearing and testified.

It will be unnecessary to discuss the merits of the original action in which judgment was entered in favor of Van-Dorgen, except to say that the evidence submitted by Rice, if true, was sufficient to authorize a belief that he had a meritorious defense if he [illegible] [illegible].

The motion to vacate the judgment was not made until more than thirty days had elapsed after the entry of the judgment. It is conceded that under Section 22 of the Municipal Court Act

the trial court had power to vacate the judgment on a petition setting forth facts which would be sufficient to authorize the vacation of a judgment at law by a court of equity. If it is charged in the petition, and the charge is supported by the evidence, that the judgment was entered as the result of fraud, accident or mistake, and was in no way caused by negligence or fraud on the part of the defendant, the trial court would have the power to enter an order vacating it. Lox v. Bradley, 179 Ill. App. 1; Doyle v. Mallows, 207 Ill. App. 5; American Surety Co. v. Bliss, 214 Ill. App. 463.

The evidence tends to support the allegation in the petition to vacate that Ries was under no legal obligation of any sort to pay Van Bergen for services rendered by him at the request of Christiansen; that after the services were rendered Van Bergen, though he claimed $1,000 therefor, entered into an agreement with Christiansen to adjust the claim for the sum of $400. Christiansen informed Ries, his co-defendant, that the claim had been settled and that he, Ries, would not have to appear in court. There is evidence that Ries' attorney, Mr. Napier, was informed by Mr. Erskine, attorney for Van Bergen, that Van Bergen's claim had been settled by agreement with Christiansen, and if this evidence be true, defendant was not negligent in failing to appear in court at the time the judgment was entered.

While the record does disclose that the cause was continued on several occasions following the bringing of the suit, the position taken by Ries that Van Bergen had settled the claim with Christiansen finds some support in the fact that no effort was made to bring the cause to a hearing for nearly four years after the bringing of the action.

The contested question of fact is whether Ries had actually been informed by plaintiff or by plaintiff's attorney that a final settlement of the claim had been made with Christiansen, and on this question the court had sufficient evidence to authorize a finding in favor of defendant.

The trial Judge did not err in holding that the judgment entered against Ries was the result of fraud, either actual or constructive, and that he was not negligent in accepting the statement of Van Bergen's attorney as true.

The order of the Municipal court will therefore be affirmed.

AFFIRMED.

McSurely and Matchett, JJ., concur.

129 - 25900

. LEVINE & CO., a Corporation,
Appellee,

vs.

INTERNATIONAL HOTEL COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

222 I.A. 668

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment against it of $4319.5[illegible], rendered in a trial by the court.

The statement of claim alleges a written contract for the purchase by plaintiff from defendant of certain materials called "junk, equipment, etc." in the basement of the Lexington hotel in Chicago, for $2900, which was paid by plaintiff, but that defendant prevented the delivery of the materials and refused to return the purchase price. There is some controversy as to the character of the suit, defendant claiming here that the statement sets forth three inconsistent causes of action. While certain sentences tend to support this criticism, we are of the opinion that considered as a whole the statement presents a claim for damages for breach of contract.

The contract, which was in writing, was made July 24, 1918. The materials sold were one ice machine plant, all pipe connections thereto, and the basement part of the elevator machinery, including old cables. Defendant agreed to disconnect and set the heavy pieces of machinery on the sidewalk or alley not later than October 1st, and plaintiff, the purchaser, agreed to disconnect and take out all of the piping and steam fitting, junk, etc., included in the contract, commencing work immediately. Apparently plaintiff took out some of the materials at different times, but says that at other times when it called for that purpose it was

prevented by defendant from taking the material. Defendant did not place the heavy machinery on the sidewalk by October 1st, the time agreed upon, and claims that the time in which this should be done was extended by agreement. Among several other things said to prove this is the fact that October 8th plaintiff removed and took away considerable material but left a quantity of other material which, under the contract, plaintiff had agreed to disconnect and remove. It is argued with force that plaintiff thus recognized the extension of the time element in the contract; that having undertaken on October 8th to continue to perform its obligation to disconnect and remove material, plaintiff could not perform this in part only and recover damages based upon the alleged failure of defendant to deliver the balance of the material which, under the contract, plaintiff should and could have than removed.

One Julius Krulewich, a broker or dealer in scrap, negotiated the contract above referred to and plaintiff agreed to pay him $300 to superintend the job of taking out the material. August 19, 1918, Krulewich made a contract on his own behalf with defendant for the purchase of two generators, engines and two belts in the basement of the Lexington hotel. The evidence tends to show that defendant was installing new elevator machinery, which was delayed by the elevator contractors, and that some of the heavy machinery called for in both of said contracts could not be removed before the new equipment was in without suspending the operation of the elevators; defendant also desired to save the expense of opening the sidewalk twice, in removing the machinery from the basement, and the testimony tends to show that Krulewich agreed to arrange to take out the heavy machinery sold under the contract of July 24th at the same time he took out the machinery purchased under the contract of August 19th; he also agreed to obtain the

necessary permit for opening the sidewalk. This contract of August 19th was assigned by Krulewich to plaintiff on October 7th, and Krulewich testifies that he then told plaintiff of his agreement to remove at the same time all of the heavy machinery called for by both contracts. While Krulewich cannot be considered as a general agent for plaintiff, yet he would seem to have authority under his contract to superintend the work for plaintiff, to arrange with defendant as to the manner and time of the removal of the machinery which required the sidewalk to be opened.

We are of the opinion that the record shows a deviation by both parties from the precise terms of the contract. It is difficult to determine who was first in fault. Defendant may be liable for the amount of the purchase money less the value of the material taken by plaintiff. This, however, is merely suggested. In any event there should have been no judgment predicated upon the value of the material which plaintiff could and should have taken on October 8th, and the rulings of the trial court in holding or refusing any propositions of law inconsistent with this conclusion were erroneous; hence it is necessary to reverse and remand for another trial.

It is unnecessary at this time to comment upon other points discussed by respective counsel.

REVERSED AND REMANDED.

Dever, P. J., and Matchett, J., concur.

165 - 25937

AMELIA B. BRATTON,
Appellee,

vs.

CHARLES J. JOHNSON et al.,
On Appeal of [illegible],
Appellant.

APPEAL FROM MUNICIPAL COURT
OF COOK COUNTY.

222 I.A. 669

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit charging that Charles J. Johnson and Samuel A. Bernbach committed an assault and battery upon her, and upon trial had a verdict and judgment against both defendants for $25[illegible]. This appeal is by Johnson alone.

The questions involved are largely those of fact. Johnson is the owner of a building of eighteen apartments in Chicago. The rent was collected by real estate agents by whom Samuel Bernbach, the other defendant, was employed at the time of the occurrence in question.

Plaintiff occupied one of the apartments. March 4, 1919, the two defendants went to the floor of the building on which this apartment was located, Bernbach intending to serve plaintiff with a five day notice to vacate, and defendant Johnson with the purpose of interviewing the tenants of another apartment on that floor with reference to decorating. Bernbach served the five day notice upon plaintiff, and she says that at this time she was assaulted and struck by Bernbach, who pulled her down the stairs, where both defendants took hold of her and pushed her violently against the wall, which she struck with her face with such force that it broke the plastering, making a hole six or seven inches in diameter and cracking some of the laths.

Defendants denied plaintiff's version of the occurrence and testified in substance that when the demand was made for rent and the five day notice served she became hysterical and abusive and procured a cane and pursued Bernbach down the stairs, striking him, and either stumbled or was thrown off her balance so that she fell, injuring her face. We are of the opinion that plaintiff has failed to prove her claim by the preponderance of the evidence, and that the judgment must be reversed.

Regardless of what Bernbach did, it is proven that Johnson did not touch plaintiff. Her story that Johnson apparently waited for her until she got to the bottom of the stairs and then together with Bernbach took hold of her and violently jammed her face into the wall seems improbable. She is contradicted by her own witnesses, who say she was hysterical and in a belligerent mood, calling Bernbach abusive names. One testified that plaintiff told her after the affair that Johnson had not touched her and had told Bernbach not to touch her. She is also contradicted by her own witnesses in several other important particulars. The testimony of Bernbach and Johnson is in substantial accord. They say that when the five day notice was served she tore it up and threw it away and began to abuse Bernbach, calling him "a dirty Jew" and threatening to knock him down; that she got a cane and when Bernbach started down the stairs plaintiff followed him and struck him on his shoulder; that when she attempted to strike a second time, Bernbach took hold of the cane and attempted to jerk it out of her hand, which caused her to fall, striking her head against the side of the wall by the stairway. Bernbach's testimony differs as to jerking the cane. The story of Bernbach and Johnson is more probable than plaintiff's and is more consistent and in harmony with the circumstances and the testimony of the other witnesses.

Some suggestion is made that Johnson could be found guilty only on the doctrine of respondeat superior; but counsel for plaintiff correctly says that defendants were joined as joint tort feasors and that Johnson cannot be held unless he actually committed the assault or abetted Bernbach in so doing.

It was erroneous to instruct the jury that if either of the defendants was guilty of the wrongs charged, their motives were wrongful and unjustified. This tended to tell the jury that Johnson would be guilty for any wrong committed by Bernbach. No instruction should have been given from which the jury might infer that defendant, Johnson, was responsible for any assault committed by Bernbach. We cannot approve the instruction that the fact that rent was unpaid and in arrears was wholly immaterial; this was a proper circumstance to be considered by the jury. It was also error to assume in any instruction that an assault and battery had been committed.

For the above reasons the judgment of the Superior court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Dever, P. J., and Hatchett, J., concur.

186 - 25955

BARTHOLOMAE AND SCHMITT BREWING CO.
AND MALTING COMPANY,
Appellee,

vs.

JOHN FRIEDEL,
Appellant.

1712

2221.A.669

MR. JUSTICE McSURLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit upon a note signed by defendant, who pleaded no consideration and non est factum. Upon trial plaintiff had a verdict and judgment for $1186, from which defendant appeals.

Plaintiff's theory, amply supported by the evidence, was that the note was executed and given by defendant to plaintiff as consideration for some saloon fixtures which plaintiff sold to defendant, giving him a bill of sale therefor. Defendant seeks to avoid the obligation imposed by the note by reason of certain other negotiations between the parties. Plaintiff was a manufacturer of beer, and defendant, a saloonkeeper, had been a customer for many years. June 15, 1917, plaintiff proposed to give defendant certain fixtures for his saloon provided defendant would give a note therefor for $1,000, secured by chattel mortgage on the fixtures and also execute a written contract agreeing to take plaintiff's beer for a term of five years, upon performance of which plaintiff would cancel the note and wipe out the indebtedness.

The representatives of plaintiff testify and defendant himself says that after reading the papers defendant refused to sign them, saying that he did not want to be bound to buy beer exclusively from plaintiff. According to his

own testimony he said, "I don't want to sign the contract, I want to be absolutely independent." This phase of the matter having failed, it was proposed to sell him the fixtures outright, giving the defendant a bill of sale and possession in consideration of the execution and delivery of the note in question, and this was consummated.

Plaintiff sufficiently proved that defendant knowingly signed the note. Defendant admitted it was his signature and testified that before acting he "read over everything."

Defendant complains of instruction number 1, given at request of plaintiff, which was to the effect that if the jury believed it was the intention of the parties that the fixtures were to become the property of defendant upon delivery of the note to plaintiff, then plaintiff is entitled to recover. It was not necessary to include in this instruction the tentative negotiations in reference to the purchase of beer. These had nothing to do with the actual transaction and are not pleaded in defense.

Some of the instructions properly may be open to criticism, but the evidence clearly sustains the verdict. No other could properly be returned, and under such circumstances we shall not reverse because of inaccuracies in the instructions. Young v. McConnell, 110 Ill. 85; Cohen v. City of Chicago, 197 Ill. App. 377.

It may be conceded that the testimony as to the value of the fixtures was immaterial. This came out incidentally, but its appearance is not reversible error.

Some suggestion is made that the sale of fixtures

by plaintiff was ultra vires. This point was not raised upon the trial either by plea or evidence and therefore cannot now be considered.

No sufficient reason is presented for setting aside the judgment and it is affirmed.

Dever, P. J., and Hatchett, J., concur.

MARY McMAHON,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAY COMPANY, CHICAGO & SOUTH CHICAGO RAILWAY COMPANY and THE SOUTHWEST STREET RAILWAY COMPANY, Operating Under the Name and Style of CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE McSURLEY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging that she was injured by the negligent starting of one of the street cars owned and operated by the Chicago Railways Company, as she was alighting therefrom. Upon trial plaintiff had a verdict and judgment for $500. Defendants have appealed.

The one question involved is the facts of the occurrence. Plaintiff, sixty-two years old at the time of the accident, took a northbound streetcar running on Clark street in Chicago, at about five-thirty in the evening of April 6, 1917. The car and rear platform were crowded with passengers. In response to plaintiff's signal the car stopped at Germania Place to permit her to alight. She testifies that while the car was standing still she got down on the step at the rear platform, and while she had one foot on the step and was in the act of putting the other foot to the ground the car started and she was thrown headlong into the street, receiving the injuries in question. It was shown that she had made a somewhat different report after the accident, saying, "I thought the car was stopped but I could not say for sure that it was stopped." Her version of the occurrence rests solely upon her testimony.

We are of the opinion it was clearly proven that the accident happened as testified to by the witness Brucklee, a passenger standing upon the rear step of the car when it stopped to allow plaintiff to alight. He says, in substance, that as there was no room for her to get off unless he got off first, he did so and stood on the street to allow her to pass; that she alighted and made two or three steps on the street away from the car; that she then fell on her knee; that the streetcar was standing still during that time; that the witness called to the conductor to wait and ran to plaintiff and helped her up from the street and brought her to the sidewalk and she walked away. This witness testifies positively that the car did not start up as plaintiff was getting off the car, but after stopping remained standing for about ten minutes. This testimony is corroborated by the testimony of the conductor and by another passenger who was standing on the rear platform, this latter witness, Ehret, testifying positively that he saw plaintiff at the time she fell and that she was on the street at the time; that he had seen her from the time she came from the inside of the car; that the car, after it stopped, did not start again until some time after the accident. Two other witnesses also corroborate this version of the occurrence. The testimony of these five witnesses is so definite and positive and certainly, with respect to the three passengers, entirely disinterested, as to convince us that the accident did not happen because the streetcar started when plaintiff was alighting, as charged in the declaration, but that she stumbled and fell on the street after the had gotten off the car in safety.

Under such circumstances it becomes our duty, under the settled law of this State, to reverse with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

209 - 25981 FINDINGS OF FACT.

We find as facts that plaintiff was not injured by the negligent management of the street car of defendants; that she was not injured while in the act of stepping off the street car; that defendant did not negligently start its car rapidly forward before plaintiff had time to get off; and that defendant or defendants were not guilty of negligent management of the street car as charged in plaintiff's declaration or any count thereof.

Dever, C. J., and Hutchett, J., concur.

315 - 26037

JOHN STEVENS,
Appellee,

vs.

NATIONAL SOCIETY OF FRUITVALERS,
THE WASHINGTON PRESS COMPANY, a
Corporation, HARRISON PARKER and
WILL H. [illegible],
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

222 I.A. 669

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

John Stevens, the plaintiff, brought suit for the benefit of the Fort Dearborn National Bank on a promissory note dated March 15, 1913, for $3,000, signed by the "National Society of Fruitvalers by Harrison Parker, Trustee," payable to the order of "ourselves," endorsed by the maker and the other defendants herein. Upon trial by the court judgment was entered against defendants for $3365.75, from which they appeal.

Failure of consideration is first argued. Defendants claim they should have been permitted to prove that the note was originally executed and delivered to Joseph H. Strong upon his verbal promise that life insurance policies would be issued to the amount of $100,000 on the life of Harrison B. Parker, and also to purchase $10,000 worth of stock of the Fruitvale Grocery and Market Company, and to discount the note of M. H. and E. H. Master for $15,000, the proceeds of which were to be paid to Parker. Defendants say that the life insurance policies were issued but that Strong refused to perform the other concurrent promises and subsequently placed the note with the bank merely for collection. The bank having obtained the note before maturity in due course held it free from any defenses available to prior parties among themselves except as to fraud. Negotiable Instrument Act. sec. 57:

Bradwell v. Pepper, 221 Ill. 618; Kavanagh v. The Bank of America, 239 Ill. 484. Hence evidence as to the alleged contemporaneous promises of Strong was incompetent.

Was the note paid at maturity by the giving of a renewal note? The note in question fell due July 19, 1913, and on this day Harrison Parker, one of the defendants, and also agent for the other defendants, called at the bank and tendered a new note for $2500, signed and endorsed by the same parties whose names were on the original note, and also tendered a check for $500 on the Standard Trust and Savings Bank, signed by the "National Society of Fruitvalers, Harrison Parker, Trustee," in payment of the original note of $3000; whereupon Parker was informed by the note teller of the Fort Dearborn Bank that they would accept the new note and the check in payment of the original indebtedness upon condition that the check should be promptly paid and that when this was done the original $3000 note would be cancelled and returned to the maker. Said check was forthwith presented to the Standard Trust and Savings Bank, but its payment was ordered stopped by the maker and it was immediately returned to the Fort Dearborn Bank marked, "Payment Stopped;" the check has never since been paid. These facts did not constitute payment of the original note. The condition upon which the new note and check were received having failed, their purpose also failed and the original obligation evidenced by the original note remained unpaid.

Leon G. Wilcox, who seems to be the treasurer of the National Society of Fruitvalers, testified that he stopped payment of the $500 check and then had a conversation with someone, not identified, at the discount window of the Fort Dearborn Bank, and was directed by him to make arrangements with Strong to take care of this; that the witness went to Strong, who took five checks of

$100 each in payment of the $600 check. There is no evidence as to what became of four of these checks. Defendant produced one check payable to the order of J. H. Strong for $100, which was apparently endorsed by Strong and deposited with the Fort Dearborn Bank. Manifestly this evidence did not prove payment of the original $3000 note.

Was notice of protest for failure to pay the original note waived by the endorsers? The answer must be in the affirmative, for the reason that the endorsers knew of the attempted renewal as shown by their endorsement of the alleged renewal note of $2500. Also the Treasurer of the National Society of Fruit-valers took part in the attempted renewal, as did Harrison Parker, trustee of this company, and also secretary and treasurer of the Washington Press Co., an endorser. Edith S. Parker, another endorser, testified she knew when she endorsed the $2500 note it was to be used in renewing the original note. Notice of dishonor may be waived and this waiver may be expressed or implied. Negotiable Instrument Act, 108. Any acts or conduct calculated to lead the holder of the note to believe that presentment is waived, or to mislead him and prevent him from treating the note as he otherwise would, will operate as a waiver. Simonoff v. Granite City National Bank, 277 Ill. 243. The above facts constitute a waiver of presentment and notice of dishonor.

The retention of the $2500 note by the bank is no defense to this action. It did not discharge the original obligation, but could be held as additional security thereto. Tyler v. Hyde, 89 Ill. App. 123. Attorneys for the bank said upon the trial that they were holding it merely as evidence and that it would be cancelled and returned to defendants as soon as the original obligation was paid.

There is nothing in the record to support the claim that the action of the Washington Press Co. in endorsing the note was ultra vires, and in the absence of such proof it will be presumed to be within the powers of the corporation. Meyer v. Illinois Life Insurance Co., 211 Ill. App. 285.

The payment of $43.75 interest in advance on the $2500 note cannot operate to make that note full payment in discharge of the original obligation of $3000; it is merely a payment on account of interest on the original debt.

The position of plaintiff is immaterially supported by the fact that it obtained the note in due course for value before maturity, and under such circumstances it has been repeatedly held that an endorser having given a note the sanction of his endorsement shall not be permitted to impeach the consideration. Dewey v. Merriner, 71 Ill. 193; Page v. Hallam & Co., 212 Ill. App. 462.

The judgment was right and is affirmed.

AFFIRMED.

Dever, P. J., and Matchett, J., concur.

71 - 25841

PILSEN COAL COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE SANITARY DISTRICT OF CHICAGO,
Defendant in Error

ERROR TO CIRCUIT COURT OF COOK COUNTY.

222 I.A. 669

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant, who was plaintiff below, sued defendant appellee, the Sanitary District of Chicago, in an action of assumpsit, for the purchase price of coal sold and delivered, of the value of $5855.40. In two counts of the declaration plaintiff set up *in haec verba* two similar supposed agreements entered into between the plaintiff and defendant on the 1st day of May, 1916, pursuant to which the coal was delivered. The defendant Sanitary District filed a plea of the general issue and with it gave notice of a claim of setoff based on the written contracts set up in said counts of plaintiff's declaration. The notice of setoff alleged failure on the part of the plaintiff to deliver coal as required by the terms of these contracts; that defendant had been required to purchase the same on the open market at an advanced price, whereby defendant lost the sum of $42,748.75. The case was tried by the court without a jury. The court made a finding for defendant (to which plaintiff excepted) and, overruling motions for a new trial and in arrest of judgment, entered judgment for the amount claimed in the setoff, less the sum conceded to be due the plaintiff for coal in fact delivered. Judgment was therefore entered for the sum of $36,893.35, and to the entering of such judgment plaintiff excepted.

Appellant here assigns as error that the court found the issues for the defendant and against the plaintiff; that it

overruled defendant's motion in arrest of judgment, and that the finding is against the weight of the evidence and contrary to the law; and in particular that the court erred in not finding the contracts upon which defendant relied void for want of mutuality. Plaintiff in its brief relies solely on this last named error. To this contention defendant in error replies that the question cannot properly be raised on the record before us for the reason that the trial was before the court without a jury, and no propositions of law were submitted to the trial Judge. Defendant in error relies on a line of cases cited in, and the reasoning of, Overland Motor Company vs. Dement, 195 Ill. App. 6. That decision was rendered by the First Branch of the Appellate Court of this District. It is well known that court and this one have maintained conflicting views on this question. However, the Supreme court of this state, in the very recent case of Pittsburg, Cincinnati, Chicago and St. Louis R.R. Co. v. Chicago City Ry. Co., No. 14050, seems to have settled this question in accordance with the views hitherto maintained by this court. The opinion in that case states:

> "In the majority of cases decided by the Appellate court involving this question, it has been held that in cases on the law side of the court, appealable in the first instance to the Appellate court, the enquiry in that court on appeal or writ of error is, did the facts, as they appear in the record, and the law, authorize the finding and judgment of the court below? And in such cases the Appellate court would be authorized to pass both upon the facts and the law, though no propositions of law were held or refused by the trial court."

Moreover, we are of the opinion that as the counts set up in haec verba the contracts upon which both parties rely, the question of law which the plaintiff seeks to have reviewed here is preserved by the motion in arrest of judgment.

The material facts, as set up in the pleadings and determined on the hearing, we find to be as follows: The Sani-

tary District is a municipal corporation existing by virtue of the statute, and plaintiff is a business corporation organized under the laws of this state. The Sanitary District is and was engaged in disposing of the sewage within the borders of the Sanitary District, and for this purpose, with others, at the time in question maintained and operated pumping stations at 39th street and Lawrence avenue in the city of Chicago. At both places large quantities of coal were steadily required in order that the stations might perform their functions. As required by law, the Sanitary District advertised for sealed proposals for furnishing approximately 2300 tons of bituminous nut coal a month, "delivered" on board cars on side track at the 39th street station, and "approximately 400 tons per month" at the Lawrence avenue station. The advertisement stated that the proposals would be received by the Clerk of the District until 12 m. standard time Thursday, April 20th, 1916, at the office of the District, and would be publicly opened at the meeting to be held that day, or at the first meeting thereafter. The advertisement also stated, "All proposals must be made upon blank forms of proposal furnished by the said Sanitary District, and shall be made in accordance with and to conform to all of the terms and conditions and 'Requirements for bidding and instructions to bidders,' and the contract and specifications which are attached thereto," which proposal was to be accompanied by a certified check; and the trustees reserved "the right to reject any or all bids." The plaintiff Coal company made similar proposals as to both stations, in which it certified that it had "examined the attached form of contract and specifications for furnishing and delivering coal to said Sanitary District, * * * and has also examined the premises at and adjacent to the locations at which deliveries are to be made, as specified, and the means of approach thereto, and the facilities for making deliveries at such locations."

It also stated, "The undersigned has also examined the foregoing 'Requirements for bidding and instructions to bidders' * * * * to furnish and deliver coal as specified in said contract and specifications of commercial name from the locality of guaranteed quality and at the price quoted, to-wit * * *."

The contracts for the two stations were similar in their provisions. The material parts of the contract for the 39th street station are as follows:

"This agreement made and entered into this 1st day of May, A. D. 1916, by and between the Sanitary District of Chicago, a municipal corporation, organized and existing under and by virtue of the laws of the State of Illinois, party of the First part, hereinunder designated The Sanitary District, and the Pilsen Coal Co., a corporation, organized and doing business under the laws of the State of Illinois, party of the second part, hereinunder designated The Contractor, witnesseth that said contractor has covenanted, contracted and agreed, and by these presents does covenant, contract and agree with the said Sanitary District for and in consideration of the payments made, as provided for herein, to the contractor by the said Sanitary District, and under penalty expressed in the Bond, bearing even date herewith, hereto attached, at his proper cost and expense, to furnish and deliver all coal called for by this agreement (free from all claims, liens and charges whatsoever) in the manner and under the conditions hereinunder stipulated. It is further covenanted and agreed that the coal furnished and delivered shall be measured and tested under the direction and supervision of the Chief Engineer of the Sanitary District of Chicago, and his properly authorized agents, by whose measurements and calculations the quantities and quality of the coal furnished and delivered under this contract, and the rates of payment therefor, shall be determined and on whose inspection the coal shall be accepted or condemned. The said Chief Engineer or other engineer designated by the Sanitary District, shall have full power to reject or condemn any or all coal furnished and delivered under this contract, which in his opinion does not conform to its spirit and to the terms and conditions herein expressed. Wherever the words Chief Engineer or Engineer are used herein, they shall be understood to mean the Chief Engineer of the Sanitary District of Chicago or other engineer designated by said Sanitary District. Attached hereto is a proposal of said contractor to furnish coal of the grades and character therein guaranteed, at the price therein mentioned, which proposal shall form a part of this contract * * * This contract includes the furnishing and delivering of coal as hereinafter specified, on board cars on the side track of the 39th Street Pumping Station of the Sanitary District of Chicago, in Chicago, Illinois, from May 15th, 1916, until May 31st, 1917, inclusive * * * *.

The probable quantity of coal required is estimated at an average of twenty-three hundred (2300) tons per month,

the consumption varying considerably from month to month during the year. The quantity is given only as an approximation, and it is hereby distinctly understood and agreed that the contractor shall furnish at the price determined as per section twelve (12) and thirteen (13) hereof, the quantity of coal required to operate the pumping station during the period of this contract, as may be ordered by the Chief Engineer, be the same more or less than the quantity herein mentioned. The contractor further agrees that any difference between the quantity of coal mentioned in the advertisement and the quantities of coal actually delivered hereunder, shall not invalidate this contract, or release the contractor from delivering all quantities of coal required by the pumping station, or as ordered by the engineer and the contractor shall not be entitled to any extra payment for damages or for loss of profits caused, of a difference between said quantity of coal mentioned in the advertisement for pro osals and quantities of coal actually delivered under this contract. The contractor shall keep himself informed as to the rate of consumption from time to time, and shall bear all demurrage charges caused by the delivery of coal more rapidly than the existing provisions for storage will allow of unloading and storing.

7. Should the contractor fail to furnish and deliver coal of the quality equal or superior to the coal herein specified, then the Sanitary District may declare this contract forfeited either as to a portion of the same or the whole thereof, and the Chief Engineer may purchase on the open market at the lowest price then obtainable, such quantity or quantities as the said contractor shall fail to furnish and deliver, or as may be needed by the requirements of said pumping station until May 31st, 1917, notwithstanding said forfeiture. The cost of said coal so purchased, and all costs and expenses incurred by the Chief Engineer of said Sanitary District in purchasing and delivering such coal at the said pumping station as above specified, in excess of the cost hereunder to said Sanitary District for an equal quantity of coal of a corresponding grade, if furnished and delivered by said contractor, at the said pumping station as specified, shall be paid to the Sanitary District by the said contractor.

Should the contractor fail to furnish and deliver coal in such quantities or at such times as the requirements of said pumping station may demand, or as ordered by the Chief Engineer of said Sanitary District, then said Chief Engineer may purchase on the open market at the lowest price then obtainable such quantity or quantities of coal as the said contractor shall fail to furnish and deliver or as may be needed by the requirements of said pumping station, until May 31st, 1917, in which event the cost of said coal so purchased, and all costs and expenses incurred by the Chief Engineer of said Sanitary District, in purchasing and delivering such coal at the said pumping station, in excess of the cost hereunder to said Sanitary District, for an equal quantity of coal of a corresponding grade, if furnished and delivered by said contractor at said pumping station as specified, shall be paid to the Sanitary District by said contractor. * * *

If at any time during the period covered by this contract there shall be a mine accident, railroad congestion, car shortage or other cause, which in the opinion of the contractor will make it desirable for him to deliver coal from sources other than the county and state named in his proposal, it shall then be the duty of the contractor to notify in writing the said Chief Engineer, who may, at his option, permit the contractor to deliver for such period as he may deem wise, the necessary quantity of coal from a source satisfactory to the engineer, other than that herein specified, such coal to be equal in quality to that contracted for. ***

12. The price per ton to be paid for all the coal delivered during any month shall be determined by dividing the average number of British thermal units per ton of coal delivered during the month by the number of British thermal units for one cent, warranted in the accompanying contractor's proposal, and subtracting from the result obtained one-half (½) cent for each per cent of ash for dry coal delivered, the resulting value being the price per ton which will be paid for that particular coal, except as hereinafter specified.

13. The Sanitary District may at its option reject any coal which the analysis report shows do not comply with the requirements of sections 3, 4, and 5, or may accept the same, subject to the following reductions in the price per ton, as computed in accordance with section 12. ***

14. Payment for coal delivered and accepted during any month will be within the following month at the rate herein specified under 'Determination of price,' provided that the requirements regarding bills of lading have been complied with (see section 8) (see sections 12 & 17). ***

17. The contractor shall execute a bond in the sum of nine thousand dollars ($9,000.00) for the performance of the work under this contract, with good and sufficient sureties, the same to be satisfactory to the Board of Trustees of the Sanitary District."

The contract is signed by both parties. The plaintiff furnished coal of the kind, quality and quantity at the price specified from the 1st day of June, 1916, to the 23rd day of November, 1916, both inclusive, and there was on the last named date bills to the credit of the plaintiff from the defendant for coal so furnished of the sum of $5858.40, the payment of which said bills became due, under the terms of said contract, during the month of December, 1916; but these bills have never been paid. After the 23rd day of November, 1916, defendant repeatedly re-

quested and demanded of the plaintiff further and continuous deliveries of coal at both pumping stations during the latter parts of the months of November and December, 1916, and plaintiff refused to make the deliveries of coal thus demanded. Since the 23rd day of November, 1916, plaintiff has refused and failed to make any further deliveries of coal notwithstanding further repeated demands therefor, said demands having been made through the Chief Engineer of the Sanitary District.

After the plaintiff failed and refused to make deliveries as above set forth, defendant purchased the coal necessary to meet the requirements of the pumping stations in the open market at the lowest price obtainable, using due care, diligence and economy, and it was agreed that the amount purchased was in amount only sufficient to meet the requirements of the pumping stations up to and including May 31, 1917; and after making all due allowance the sum of $42,748.75 is the excess which defendant paid over and above what it would have paid to plaintiff if plaintiff had furnished all the coal required and used at said stations.

The evidence also tends to show that plaintiff gave as his only reason for refusing to fulfil the contract was the increased cost of coal, and that at the time of refusing to deliver he did not question the validity of the contracts.

The sole issue is whether these contracts, upon which both parties rely and the terms of which are not in dispute, are void for want of consideration and lack of mutuality.

That a contract without consideration or lacking in mutuality is void is elementary, but it is not always easy to draw the lines which determine when a given contract is invalid for these reasons. It is the contention of appellant that these

contracts are mere options; that they amount simply to offers on the part of plaintiff which the Sanitary District did not accept, and that neither party is bound thereby; and that the plaintiff, as the proposer, had a right by due notice to revoke them.

Appellant contends that the law applicable is as follows: That an accepted offer to sell such a quantity of goods as shall be needed, required or consumed by an established business of the acceptor is valid; but an accepted offer to sell goods in such quantities as the acceptor may order, want or desire, is without consideration and void; that accepted orders for goods under contracts void for such reasons as are above stated, constitute valid sales of the goods so ordered at the price named in the contracts, but do not validate contracts as to the goods which one refuses to purchase or the other refuses to sell or deliver under the void contracts. These propositions of law have been settled by numerous cases. American Refrigerator Transit Co. v. Chilton, 94 Ill. App. 6; Brinley v. Mathiesen, 107 Ill. App. 379; Hirbee v. Rust, 211 Ill. 333; Joliet Bottling Co. v. Joliet Brewing Co., 254 Ill. 415; Gold Blast Furnace Co. v. K. C. Bolt & Nut Co., 114 Fed. 77.

The difficulty arises in applying these well settled rules to the facts of the instant case. If we read carefully the terms of these contracts, it is apparent that there is no express promise of the Sanitary District to take any coal which the plaintiff proposes to sell. The promises are all made by the contractor, not by the supposed purchaser. A casual reading of the contract would therefore indicate that it is nudum pactum. The real test is, we think, whether plaintiff could have maintained an action under the contract against the Sanitary

District in case the coal had been tendered by plaintiff and defendant had refused to take it. Defendant maintains that thus tested the contracts are valid. It argues that in considering these contracts the court should arrive at the intention of the parties and, to do so, will place itself in the positions of the contracting parties, (Conway Co. v. City of Chicago, 274 Ill. 369) and consider the whole contract; that a contract should be construed in such a way as to make the obligations imposed by its terms mutually binding upon the parties unless such consideration is wholly negatived by the language used; (Minn. Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85) that where the terms of a contract are in any respect uncertain or doubtful, and the parties have by their conduct given a practical construction of the contract, such construction will govern; (Gillett v. Teel, 87 Ill. 106; McLean County Coal Company v. City of Bloomington, 234 Ill. 90) that an agreement to purchase may be implied from the obligation to sell where it appears from the entire contract that it was the intention to bind the purchaser. Defendant relies on the doctrine stated in Corpus Juris, vol. 13, p. 334, sec. 180.

> "To show mutuality the obligation may be implied, as well as express. Although on its face and by its express terms the contract is obligatory on one party only, yet if the intention of the parties and the consideration on which the obligation is assumed, is that there shall be a correlative obligation on the other side, the law will imply it. *** An agreement to purchase may be implied from an obligation to sell."

Citing also Sterling Coal Co. v. Silver Springs Bleaching & Dyeing Co., 161 Pac. 848; King-Keystone Oil Co. v. San Francisco Brick Co., 82 Pac. 849.

Applying the law as above stated to the facts in this case, the majority of the court are of the opinion that Minn. Lumber Co. v. Whitebreast Coal Co., supra, is controlling; that the agreement must be construed as containing an implied promise

on the part of the Sanitary District to buy the coal which the contractor promises to furnish; particularly is it thought such promise may be inferred from the provisions of clause 7, as above set forth. In the opinion of the court, therefore, the contracts were mutual and valid, and the judgment should be affirmed.

The writer of this opinion is not able to assent to this conclusion. The rules that the object of construction is to find the intent of the parties; that the entire language of the contract must be considered to that end; that a contract will be liberally construed in order to prevent a judgment which would pronounce it void, are elementary. But I do not understand that courts will go outside the express language of a contract which apparently contains the entire agreement, in language which the parties have chosen to adopt, and, in the absence of any ambiguity in such language, place themselves in the condition of the parties at the time of making it, or introduce therein terms which the parties themselves did not see fit to insert. There is no ambiguity, as I see it, in these contracts. The language thereof was, in the first instance, chosen by the Sanitary District, and from the language it may very justly be inferred that the writers of the contracts were not unacquainted with legal terminology.

It is nowhere said that it is mutually agreed; nowhere are the proposals of the bidder accepted; nowhere does the Sanitary District bind itself to do anything except to pay for such coal as its engineer may thereafter see fit to order, and which, upon its delivery, may prove to be to his satisfaction.

It seems to me from the studied avoidance of the use of any terms amounting to a promise that the Sanitary District intended not to be bound, and not binding itself, I

think it failed in law to bind the contractor. However, in accordance with the opinion of the majority of the court, the judgment will be affirmed.

AFFIRMED.

MR. JUSTICE McSURELY SPECIALLY CONCURRING. To give section 7 of the contract meaning and effect it must be read as defining the only conditions and circumstances under which the Sanitary District may purchase coal of parties other than the plaintiff. Conversely, under all or any other conditions and circumstances the Sanitary District must purchase its requirements of coal from the plaintiff. In a unilateral contract these provisions would be superfluous and meaningless.

248 - 26626

AGNES SUOLAR,
Appellee,

vs.

CHICAGO RAILWAY CO.,
et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

222 I.A. 670

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff, who is appellee here, sued in an action on the case for personal injuries alleged to have been received by her as a result of the negligence of defendants' servants. The accident occurred November 11, 1917, at the intersection of Blue Island avenue and Wood street.

Plaintiff at that time was riding in an automobile with her husband, who was in control of it. They were proceeding in a direction somewhat to the northeast, near to the street car tracks which were laid in Blue Island avenue. At the same time a car of defendants was being driven towards the southwest on one of these tracks. The automobile turned to cross Blue Island avenue at the intersection of Wood street, and while on the track was squarely hit by the street car going at a speed which in the opinion of witnesses varied from three to eighteen miles an hour.

The declaration in its several counts alleged general negligence and negligence in that defendant ran its car at an excessive rate of speed and failed to warn the occupants of the automobile of the approach of the street car by sounding the gong. The defendants pleaded the general issue, and the parties submitted evidence to the jury tending to sustain their respective contentions. The jury returned a verdict for the plaintiff in the sum of $2041.65. The court required a remittitur

of $541.65, and upon the remittitur being entered overruled the motion of the defendants for a new trial and in arrest of judgment and entered judgment for the plaintiff in the sum of $1500.

It is assigned and argued as error that the judgment is against the manifest weight of the evidence; that it is excessive, and that the court erred in receiving and excluding evidence, and also in the giving and refusing of instructions.

It was the theory of the plaintiff, and the evidence in her behalf tended to show, that the automobile turned north towards Wood street, from the south side of Blue Island avenue, when the street car was from 150 to 200 feet distant, and that the street car was negligently driven at an excessive speed and with such carelessness otherwise as to cause a collision; while the theory of defendants was, and their evidence tended to show, that the street car was being operated with due care, but that the automobile turned into the pathway of the approaching westbound car when the car was so close to the automobile that the motorman could not, in the exercise of reasonable care, have stopped the street car in time to avoid the collision.

We have examined the evidence tending to support these two theories. Some of the witnesses on each side are contradicted by statements made by them at other times, and there are facts and circumstances tending to support both theories. The plaintiff was at the disadvantage of finding it necessary to testify through an interpreter, and the record is a difficult one for an appellate court to satisfactorily review. We are, however, upon the whole, of the opinion that we cannot, as a matter of law, say that the verdict of the jury is wrong; nor, weighing the facts, as it is our statutory duty to do, can we say that the verdict is manifestly against the weight of the evidence. Nor do we think that we can

say that the amount of the judgment is excessive.

The contention of the appellant, however, that the court erred in the giving and refusing of instructions, raises a more serious question. Appellee concedes error in the ninth instruction, which told the jury that it was not necessary that any witness should have expressed an opinion as to the amount of damages, but that the jury might themselves make such estimate from the facts and circumstances in evidence, and by considering them in connection with their knowledge, observation and experience in the common affairs of life. Appellee contends, however, that the error in this question was cured by the remittitur.

A yet more serious question is, we think, raised by the contention that plaintiff's given instruction No. 5 was erroneous. This instruction told the jury, "if you believe from the evidence that the motorman of the car in question, which it is alleged struck plaintiff, was, or in the exercise of reasonable care, should have seen the automobile in which plaintiff was riding at the time and place in question, as it approached the track upon which said car then and there was running at the time and place in question, and if you further believe, under all the circumstances of the case as shown in the evidence, that the motorman then and there could and should, in the exercise of ordinary care, have sounded the bell or given some other means of alarm in time to have warned plaintiff and the driver of said automobile, of the approach of said car, before it was too late to enable said automobile to escape a collision, but failed so to do, and that such failure was negligence on his part, and that such failure, if any, caused or proximately contributed to cause an injury to plaintiff, as alleged in her declaration, while she was in the exercise of

ordinary care for her own safety, then you must find the defendant guilty."

While this instruction states a correct rule of law under some state of facts, we think it should not have been given under the facts in this case, for the reason that plaintiff's own evidence tended to show that both she and her husband saw the street car some 200 feet away prior to driving upon the track. It has been many times held by the highest court of this state, that where the injured plaintiff sees the car approaching, the failure to sound the gong cannot be the proximate cause of the subsequent injury; and that the issue of whether or not the gong sounded becomes an immaterial one. Alenta v. Chicago City Ry. Co., 264 Ill. 246. In this connection plaintiff cites us to the case of Loftis v. Chicago Rys Co., 293 Ill., 473, and argues that the continuous sounding of the gong would have indicated to the driver of the automobile that the street car would not stop at that intersection. The difficulty with this contention is that plaintiff did not try her case on that theory, and there is no evidence in the record tending to show that plaintiff or the driver had any thought that the car was about to stop. Indeed questions, answers to which might have shown whether this was true or not, were objected to by the plaintiff and the objections sustained by the court. We think, therefore, that the giving of this instruction was such error as requires a reversal.

We think, too, that instruction No. 2 for plaintiff is subject to criticism. It told the jury that if they believed from the evidence that plaintiff, while in the exercise of ordinary care, was injured by the negligence of defendant, as alleged, then they might find a verdict in her favor, though they might believe that the driver of the automobile was also negligent,

cautionary note for her own safety, then you must find the original and only.

The last instruction which I asserted was not
law under some state, so that it should not have been given
under the facts in this case, for the reason that (notwithstanding
one witness tended to show that both car and her husband saw
the street car some 200 feet away prior to driving upon the
track. It has been many times held by the highest court of
this state, that where the injured plaintiff had the only ex-
perience, the failure to sound the gong cannot be the proximate
cause of the subsequent injury; and that the issue of whether or
not the gong sounded becomes an immaterial one. Illinois v. Chicago
City Ry. Co., 204 Ill. 240. In this connection plaintiff cites us
to the case of Lottie v. Chicago City Ry., 207 Ill., 497, and insists
that the continuous sounding of the gong would have initiated to
the driver of the automobile that the street car would not stop
at that intersection. The difficulty with this contention is that
plaintiff did not try her case on that theory, and there is no
evidence in the record tending to show that plaintiff or the
driver had any thought that the car was about to stop. Under
questions, answers to which might have shown whether this was true
or not, were objected to by the plaintiff and the objections sus-
tained by the court. In this, however, if the giving of
this instruction was such error as requires a reversal.

It claims, that that instructing the jury to the effect
is subject to criticism. It is the law that if that testimony
from the evidence that plaintiff, while in the exercise of ordi-
nary care, was injured by the negligence of defendant, or jointly,
then they should find a verdict in her favor, though they might
believe that the driver of the automobile was also negligent.

and that his negligence, if any, contributed to cause the injury to plaintiff, if any, as "his negligence, if any, is not imputable to plaintiff and she is not legally responsible for the same." There were circumstances in evidence tending to show participation and acquiescence on plaintiff's part in the conduct of the driver, which the jury might have believed to be negligent. We think the jury might have been misled by the last clause of the instruction to think that that question had been taken from them by the instruction of the court. The tendency of this clause was, we think, to confuse the jury on this point.

For the errors indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Dever, P. J., and McSurely, J., concur.

281 - 26053

11/9/61

ALBERT J. BROCKMAN,
Appellee,

vs.

T. . DONOVAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

222 I.A. 670

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant was sued in forcible detainer for possession of certain premises described in the statement of claim and on a claim for the rent of these pre ises due and unpaid to the amount, as alleged, of $297.50. Appellant entered his appearance but did not file an affidavit of merits and upon the trial, which was before the court without a jury, offered no evidence. The court made a finding for plaintiff and entered judgment for possession and for the amount of rent claimed.

Appellant first contends that as the lease which was offered in evidence was signed by the lessee only, it was void for want of mutuality. There is no merit in this contention. McFarlane v. Williams, 107 Ill. 33. Nor is there any merit to the further contention that the plaintiff could not recover because the abbreviation "Agt." appears after the name of lessor in the body of the lease. The question of variance is not properly preserved in this record.

Appellant further contends that the Statute of Frauds bars the suit. This defense must always be pleaded if it is desired to take advantage of it. It is not pleaded here.

The next contention of appellant is that no notice to quit or demand for the rent was ever made prior to the beginning of the suit. These, however, were not necessary under the provisions which appeared in the lease offered in evidence. Hagen v. Hinchliffe, 131 Ill. 468; Malinski v. Brand, 76 Ill.

The appeal is without merit and the judgment is affirmed.

AFFIRMED.

Dever, P. J., and McGurely, J., concur.

330 - 26102

ORLIG MORRIS,
Appellee,

vs.

MOSES LEVITAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

222 I.A. 670

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff below sued on a check to plaintiff's order for the sum of $350, delivered to the plaintiff by defendant October 20, 1919. After the delivery of the check defendant stopped payment of it.

The affidavit of merits sets up that the defendant had the right to stop payment because the check was given on behalf of one Abe Stein and for the purpose of satisfying a deficiency decree theretofore entered in the Superior court of Cook County against the said Abe Stein and one Nathan Rosenzweig; that said check was delivered to Ben B. Morris, the son of and attorney for the plaintiff, upon the representation that said decree had not been satisfied in whole or in part; that without such representations he, defendant, would not have issued the check, but that said decree had in fact been settled in full prior to the delivery of the check, by Nathan Rosenzweig. The case was tried by the court without a jury and there was a finding for the plaintiff and judgment for the full amount of the check.

Nathan Rosenzweig was a tenant in the premises upon which the mortgage had been foreclosed, of which premises plaintiff became the purchaser. The evidence for the defendant tended to show that Rosenzweig on October 16th made an agreement to continue in the premises at an increased rental, and that in

consideration thereof and the payment in advance of rent amounting to $60, plaintiff, through his attorney, agreed to satisfy the decree.

It is undisputed that a check for $60 was given by Rosenzweig to the attorney for plaintiff on October 16th, but plaintiff's testimony tends to show that Rosenzweig had theretofore been an unsatisfactory tenant; that plaintiff had served on him a notice to quit, and that in order to remain in the premises he, Rosenzweig, paid the higher rental and in advance.

The testimony of Morris, Jr., who conducted these negotiations in his father's behalf, is to the effect that he told Rosenzweig that Stein wished to get an assignment of the deficiency judgment in order that he might thereby continue the lien against Rosenzweig's real estate, and Morris says that he, Morris, agreed that if the rent was paid in advance he would not give Stein such an assignment. Ben B. Morris was a necessary witness in the case, and it is to be regretted under these circumstances that he not only appeared as the principal witness, but also as attorney in the case. Nevertheless, we are satisfied that the finding of the trial court, who saw the witnesses, is justified by the evidence.

In the first place, the alleged agreement is a very improbable one in view of Stein's financial responsibility, which we may presume from the record. In the second place, the writings - which are always much more satisfactory than alleged oral declarations - tend strongly to corroborate the testimony given in plaintiff's behalf. On the margin of the check appears the notation, "for rent of store at 2011 Ogden av. for months--balance of October, November and December, 1919." This notation on the check was written in the

office of Mr. Rosenzweig's attorney, Mr. Schulman, and is in the handwriting of Rosenzweig's son, who delivered the check to Ben R. Morris at the latter's office. It seems impossible to believe, in view of the fact that Rosenzweig had the advice of his attorney in the matter, that such a notation would appear thereon without other writing to evidence the agreement for the satisfaction of the decree, if such agreement was in fact made.

Clearly, we cannot say that the finding is against the manifest weight of the evidence, and it is therefore unnecessary to discuss points of law argued by appellant which are based on the theory that the finding is against the weight of the evidence.

The judgment is affirmed.

PETTEN.

Dever, P. J., and McSurely, J., concur.

142 - 26415

ILLINOIS GLASS COMPANY,
a corporation,
Appellee,

vs.

WESTERN DAIRY COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 670

MR. PRESIDING JUSTICE SHIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $677.05, against the defendant, rendered June 18, 1920, upon the verdict of a jury, by the Municipal Court of Chicago, in an action in assumpsit. The jury by their verdict disallowed defendant's claim of set off and assessed plaintiff's damages at the full amount of its claim.

On May 4, 1917, the parties entered into a written contract wherein plaintiff agreed to sell and defendant agreed to buy on or before December 31, 1917, ten (10) cars of milk bottles of different sizes at certain named prices per gross. It was further agreed inter alia that the cars should be routed over the Big Four and B. & O. railroads and delivered at a team track at 16th and Morgan streets, Chicago; that five cars should be shipped by September 1, 1917, on specifications as to quantities and sizes furnished by the buyer on or before May 15, 1917; that the prices agreed upon were f.o.b. Winchester, Indiana, less freight to destination; that all goods should be invoiced on the date of shipment and invoices should be due and payable net 30 days after date, or 1% discount for cash if paid within 10 days from date; that should the financial responsibility of the buyer become impaired or unsatisfactory to the seller at any time, cash in advance of shipment or satisfactory security might be demanded; that shipments should be made as closely as possible upon specifications furnished in advance; and that in consideration

This is an appeal from a judgment for $627.62, against the defendant, rendered June 12, 1920, upon the verdict of a jury, by the municipal court of Chicago, in an action in assumpsit. The jury by their verdict diminished defendant's claim of set off and assessed plaintiff's damages at the full amount of its claim.

On May 4, 1917, the parties entered into a written contract whereby plaintiff agreed to sell and defendant agreed to buy on or before December 31, 1917, ten (10) cars of milk bottles of different sizes in metric quart pint and liter. It was further agreed under this that the cars should be ready over the 5th four and E. & O. railroads and delivered at a rate based of 1000 and Borden stocks, Chicago; that five cars should be shipped by September 1, 1917, on specification as to quantities and sizes furnished by the buyer on or before May 10, 1917; that the prices agreed upon were f.o.b. Manchester, Indiana, that freight is destination; that all goods should be invoiced on the date of shipment and invoices should be due and payable net 30 days after date, or 1% discount for cash if paid within 10 days from date; that should the financial responsibility of the buyer become impaired or unsatisfactory to the seller at any time, even in advance of shipment or satisfactory security might be demanded; that shipments should be made as closely as possible upon specifications furnished in advance; and that in consideration

of the execution of this contract it was agreed that the same should "operate as a cancellation and liquidation of all claims of either party growing out of or connected with former contracts or agreements between the parties."

The action was commenced in March 7, 1918. In plaintiff's amended statement of claim, after setting forth the contract, it is alleged that plaintiff delivered to the Grand Rapids & Indiana Railway Co., at Winchester, Indiana, on June 1, 1917, one car load of milk bottles consigned to defendant at Chicago, containing about 163 gross of bottles of three different sizes; that on June 1, 1917, plaintiff invoiced the goods and mailed the invoice to defendant, which at the contract prices amounted to the total sum of $715.66, and which sum was due and payable under the contract 30 days after that date; that defendant did not pay or offer to pay for said goods at any time within said 30 days; that on July 5, 1917, plaintiff notified defendant that it had cancelled and rescinded said contract because of defendant's failure to pay for said goods within said 30 days; that defendant had not paid plaintiff for said goods or any part thereof; that the reasonable cash market value of said goods at the time and place of delivery was $715.66; and that there was due to plaintiff from defendant the said sum, less a deduction of $38.63 for freight charges paid by defendant, amounting to the net sum of $677.03.

Defendant, in its amended affidavit of merits, filed April 2, 1920, admitted the making of the contract, the shipment of said carload of bottles on June 1, 1917, and that it had not paid plaintiff for the same. It alleged that on or about July 9, 1917, it offered to pay plaintiff for the same, but that plaintiff wrongfully refused to accept the offered payment, and had on July 5, 1917, wrongfully cancelled the contract and wrongfully refused to further perform the contract on its part

of the execution of this contract it was agreed that the same should "operate as a cancellation and liquidation of all claims of either party growing out of or connected with former contracts or agreements between the parties."

The action was commenced in March 7, 1918. In plaintiff's amended statement of claim after setting forth the contract, it is alleged that plaintiff delivered to the crand Rapids & Indiana Railway Co., at Winchester, Indiana, on June 1, 1917, one car load of milk bottles consigned to defendants at Chicago, containing about 185 gross of bottles at three different prices; that on June 1, 1917, plaintiff invoiced the goods and mailed the invoice to defendant, which at the contract prices amounted to the total sum of $718.64, and which sum was due and payable under the contract 30 days after that date; that defendant did not pay or offer to pay for said goods at any time within said 30 days; that on July 5, 1917, plaintiff notified defendant that it had cancelled and rescinded said contract because of defendant's failure to pay for said goods within said 30 days; that defendant had not paid plaintiff for said goods or any part thereof; that the reasonable cash market value of said goods at the time and place of delivery was $718.64; and that there was due to plaintiff from defendant the said sum, less a deduction of $48.60 for freight charges paid by defendant, amounting to the net sum of $677.04.

Defendant, in its amended affidavit of merits, filed April 2, 1918, admitted the making of the contract, the shipment of said carload of bottles on June 1, 1917, and that it had not paid plaintiff for the same. It alleged that on or about July 6, 1917, it offered to pay plaintiff for the same, but that plaintiff wrongfully refused to accept the offered payment, and that on July 5, 1917, wrongfully cancelled the contract and wrongfully refused to further perform the contract on its part

to be performed, although defendant was then ready, willing and able to perform the same on its part. It further alleged that the invoice mentioned in plaintiff's amended statement of claim was not made in accordance with the provisions of the contract, in that the shipment was not routed by the carriers designated in the contract. It further alleged that time was the essence of the contract relative to the manufacture and delivery of the bottles; that, by reason of plaintiff's first breach of the contract in its failure to make the shipment of June 1, 1917, by the carriers designated, the defendant sustained damages, in that it became liable to pay freight charges in excess of the amount fixed by the contract, and in that the shipment was delayed in transit by reason of such misrouting, and "such delay" necessitated defendant purchasing in the market, at the then market price, large quantities of bottles to meet the requirements of defendant's business, which market price exceeded the contract price; that by reason of plaintiff's wrongful refusal to further perform said contract after July 5, 1917, defendant was compelled to purchase bottles in the open market, the then market value of which exceeded the contract price in about the sum of $780, and that as a result defendant had sustained damages in excess of the amount claimed by plaintiff. And defendant, as a further defense, alleged that on or about February 5, 1916, it entered into a prior contract with plaintiff for the purchase of certain other milk bottles to be delivered to defendant in Chicago; that on or about February 2, 1917, plaintiff wrongfully refused to continue the performance of said contract on its part, and wrongfully refused to manufacture and deliver to defendant three car loads of bottles remaining undelivered under said contract; that by reason thereof defendant was compelled to purchase other bottles in the open market at the then market value, which was in excess of the contract price in the amount of $509.95; that

to be performed, although defendant was then ready, willing and able to perform the same on its part. It further alleged that the invoice mentioned in plaintiff's amended statement of claim was not made in accordance with the provisions of the contract, in that the shipment was not routed by the carriers designated in the contract. In further claim, it was also the question of the contract relative to the manufacture and delivery of the boilers; that, by reason of plaintiff's first breach of the contract in its failure to make the shipment of June 1, 1919, by the carriers designated, the defendant suffered damages, in that it became liable to pay freight charges in excess of the amount fixed by the contract, and in that the shipment was delayed in transit by reason of much switching, and "such delay" necessitated defendant performing in the matter, at the time another price, large quantities of boilers (it was the regular method of defendant's business, under another price) demanded the new street price; that by reason of plaintiff's wrongful refusal to fulfill perform this contract after July 1, 1919, defendant was compelled to purchase boilers in the open market, the fair market value of which exceeded the contract price in about the sum of $780, and that as a result defendant had sustained damages in excess of the amount claimed by plaintiff. And defendant, as a further defense, alleged that on or about February 5, 1919, it received from a little department with plaintiff the specimen of boilers other milk boilers to be delivered to defendant in Chicago; that on or about February 8, 1919, plaintiff wrongfully refused to continue the performance of said contract on its part, and wrongfully refused to manufacture and deliver to defendant these car loads of boilers remaining unshipped under said contract; that by reason thereof defendant was compelled to purchase similar boilers in the open market at the then market value, which was in excess of the contract price in the amount of $[illegible]; that

thereafter negotiations were had relative to the compromise of defendant's claims, and plaintiff induced defendant to enter into the contract of May 4, 1917, above declared upon by plaintiff, in which contract it was provided that the execution of the same should operate as a cancellation and liquidation of all claims of either party growing out of or connected with former contracts or agreements between the parties; that, by reason of plaintiff's wrongful cancellation of said contract of May 4, 1917, and its wrongful refusal to continue the performance thereof on its part, the compromise settlement and cancellation and liquidation of defendant's claims under said contract of February 5, 1916, "became null and void and its said claims became revived;" and that accordingly, defendant is entitled to recoup, as against plaintiff's said claim, the said sum of $509.95. And defendant further alleged in substance that, by reason of the said breaches of the said two contracts plaintiff has caused defendant to suffer damages in the total sum of $1,289.95; and that defendant in this action is entitled to recover from plaintiff the sum of $613.58, being the difference between said $1,289.95, and the value of the goods sued for by plaintiff.

Defendant also filed an amended statement of claim of set-off in which the allegations were substantially the same as contained in its said affidavit of merits and in which it claimed that the net sum of $613.58 was due it. Subsequently, after the court had denied plaintiff's motion to strike both papers from the files, plaintiff filed an affidavit of merits to the said statement of claim of set-off, in which it denied that defendant was entitled to any set-off in any sum.

On the trial before the jury the following undisputed facts were disclosed: On June 5, 1917, defendant received at Chicago by mail plaintiff's invoice, dated June 1st, of the carload of bottles showing $715.66 to be due plaintiff, and on

Thereafter negotiations were had relative to the compromise of defendant's claim, and plaintiff became satisfied to enter into the contract of May 4, 1917, above declared upon by plaintiff, in which contract it was provided that the execution of the same should operate as a cancellation and liquidation of all claims of either party growing out of or connected with former contracts or agreements between the parties; that, by reason of plaintiff's wrongful cancellation of said contract of May 4, 1917, and its wrongful refusal to continue the performance thereof on its part, the respective rights and obligations and liabilities of defendant's claims under said contract of February 5, 1916, became null and void and its said claims became forfeited and that accordingly, defendant is entitled to recover, as against plaintiff's said claim, the said sum of $800.00. And defendant further alleged in substance that, by reason of the said breaches of the said two contracts plaintiff has caused defendant to suffer damages in the total sum of $1,200.00; and that defendant in this action is entitled to recover from plaintiff the sum of $812.00, being the difference between said $1,200.00, and the value of the goods sold for by plaintiff.

Defendant also filed an amended statement of claim of set-off in which the allegations were substantially the same as contained in the said affidavit of merits and in which it claimed that the sum of $812.00 was due it. Subsequently, after the court had denied plaintiff's motion to strike both papers from the files, plaintiff filed to affidavit of merits in the said statement of claim of set-off, in which it denied that defendant was entitled to any set-off in any sum.

On the trial before the jury the following undisputed facts were established: On June 8, 1917, defendant received at Kiln-on by mail plaintiff's invoice, dated June 1st, of the contract of bottles showing $718.00 to be due plaintiff, and an

the same day received by mail the bill of lading therefor issued by the Grand Rapids and Indiana Railroad Co. at Winchester, Indiana, showing the receipt on June 1st by said railroad company of said bottles consigned to defendant - destination 16th and Morgan streets' team track, Chicago, and routed over said Grand Rapids & Indiana and B. & O. railroads. On June 8th the bottles arrived at destination in Chicago and were received and accepted by defendant, and on June 14th it paid the freight charges thereon, amounting to $38.63. On July 5th, said bottles not having been paid for by defendant within 30 days from the date of the invoice, plaintiff notified defendant by mail that it had cancelled the contract of May 4th entered into between the parties "as to the balance of the bottles yet to be manufactured," and that the action had been taken on account of defendant's "failure to keep and fulfill the terms of said contract." This notification was received by defendant in Chicago on July 9th, on which day a representative of defendant called on the sales manager of plaintiff at its Chicago office and inquired as to what was meant by said letter, and was informed that plaintiff had cancelled the contract because defendant had not paid for the bottles shipped on June 1st within the 30 days required by the contract. Defendant's representative then offered a check in payment of said bottles so previously shipped, provided plaintiff would continue to carry out the contract and deliver the other bottles it had agreed to deliver. This offer was refused. The fair cash market value in June 1917, in Chicago, of milk bottles of the quantities, kinds and sizes mentioned in plaintiff's said invoice was the same as the prices set forth therein, or the total sum of $715.66. The distance from Winchester, Indiana to Chicago, via the Grand Rapids and Indiana and the B. & O. railroads is 234 miles, while the distance between said points, via the Big Four and the B. & O. railroads is 251 miles.

the same day received by mail the bill of lading therefor issued by the Grand Rapids and Indiana Railroad Co. at Manchester, Indiana, showing the receipt on June 1st by said railroad company of said bottles consigned to defendant - destination Ish and Rapids & Indiana and R. & G. railroads. On June 8th the bottles arrived at destination in Chicago and were received and accepted by defendant, and on June 14th it paid the freight charges thereon, amounting to $28.63. On July 8th, said bottles not having been paid for by defendant within 30 days from the date of the invoice, plaintiff notified defendant by mail that it had cancelled the contract of May 4th entered into between the parties "as to the balance of the bottles yet to be manufactured," and that the action had been taken on account of defendant's "failure to keep and fulfill the terms of said contract." This notification was received by defendant in Chicago on July 9th, on which day a representative of defendant called on the sales manager of plaintiff at its Chicago office and inquired as to what was meant by said letter, and was informed that plaintiff had cancelled the contract because defendant had not paid for the bottles shipped on June 1st within the 10 days required by the contract. Defendant's representative then offered a check in payment of said bottles as previously shipped, requiring plaintiff would continue to carry out the contract and deliver the other bottles it had agreed to deliver. This offer was refused. The fair cash market value in June 1917, in Chicago, of milk bottles of the quantities, kinds and sizes mentioned in plaintiff's said invoice was the same as the prices set forth therein, or the total sum of $718.66. The distance from Manchester, Indiana to Chicago, via the Grand Rapids and Indiana and the R. & G. railroads is 444 miles, while the distance between said points, via the Pit Pere and the R. & G. railroads is 101 miles.

Many points are made and argued by counsel for defendant as grounds for a reversal of the judgment. We have considered them and deem them to be without merit.

Under the terms of the contract of May 4, 1917, plaintiff shipped to defendant on June 1, 1917, one of the ten cars of milk bottles contracted for, and on said day mailed an invoice and a bill of lading of the shipment to defendant showing that bottles to the value of $715.66 at the prices named in the contract were contained in said car. The invoice, bill of lading and bottles were all received by defendant and the bottles were accepted by it. By the express provision of the contract these bottles were to be paid for by defendant at the prices charged, less freight from Winchester, Indiana, to Chicago, within 30 days from June 1, 1917, and defendant did not pay for the bottles within that time. This, we think, constituted a breach of the contract on the part of defendant and justified plaintiff in cancelling the contract, refusing to make further deliveries and bringing suit to recover the value of the bottles delivered less the freight charges, and defendant, being first in default, cannot recoup or set-off its damages, if any there were, because of plaintiff's refusal to furnish further bottles at the contract prices. (See, Purcell Co. v. Sage, 200 Ill. 342, 347; Norber Bros. Co. v. Moffat Cycle Co., 151 Ill., 84; George H. Hess Co. v. Dawson, 149 Ill., 138; Bradley v. King, 44 Ill., 339, 341.)

It is urged by defendant's counsel that plaintiff first breached the contract in that the carload of bottles in question were routed over the Grand Rapids and Indiana and B. & O. railroads, instead of over the Big Four and N. & O. railroads as provided in the contract. Even if this be considered a technical breach of the contract it is one that under the circumstances cannot be availed of by defendant. It knew from the bill of lading how the car had been routed. It then made

Many points are made and argued by counsel for defendant as grounds for a reversal of the judgment. We have considered them and deem them to be without merit.

Under the terms of the contract of May 6, 1917, plaintiff shipped to defendant on June 1, 1921, one of the two cars of milk bottles contributed for, and on said day mailed an invoice and a bill of lading of the shipment to defendant showing that bottles to the value of $[illegible] at the prices plaintiff in the contract were contained in said car. The invoice, bill of lading and bottles were all received by defendant and the bottles were accepted by it. By the express provisions of the contract these bottles were to be paid for by defendant at the prices charged. Defendant then discovered, thinking, in October, within 30 days from June 1, 1921, some defectives did not pay for the bottles within that time. This, we infer, constituted a breach of the contract on the part of defendant and justified plaintiff in rescinding the contract, refusing to make further shipments and bringing suit to recover the value of the bottles delivered less the freight charges, and defendant, being first in default, cannot recover in set-off the damages, if any there be, resulting of plaintiff's refusal to furnish further bottles of the contract price. [See, Pierce [illegible] v. [illegible], 200 Ill. 227, 241; Kinney Iron Co. v. Bolton Steel Co., 201 Ill. 44; Slater & Slater Co. v. Dawson, 149 Ill. 118; Gardner v. Ebro, 41 Ill. 339, 341.]

It is urged by defendant's counsel that plaintiff first breached the contract in that the series of bottles in question were routed over the Grand Rapids and Indiana and B. & O. railroads, instead of over the Air Line and B. & O. railroads as provided in the contract. Even if this be considered a technical breach of the contract it is one that under the circumstances cannot be availed of by defendant. It came from the fact of having how car had been routed. It been more

no objections but accepted the bottles and paid the freight. Furthermore, there is nothing in the record to show that defendant suffered any damages from the misrouting, or that had the car been routed as provided in the contract it would have arrived earlier in Chicago. It appears that the route over which the car travelled is 17 miles shorter than the other route.

It is also urged by defendant's counsel that plaintiff's breach of the contract of May 4, 1917, revived defendant's claim for damages sustained by plaintiff's alleged breach of the prior contract of February 5, 1916, and that the trial court erred in refusing to admit in evidence said prior contract. We do not think that the court committed error in this regard. Plaintiff did not breach the contract of May 4, 1917, but defendant first breached it in the manner shown. Furthermore, by the express provision of said contract all claims which defendant then had against plaintiff, arising out of said contract of February 5, 1916, were cancelled.

We are of the opinion that the verdict of the jury was fully warranted under the evidence and under the law and that the judgment of the Municipal Court should be affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

no objections but accepted the bulletin and paid the freight. Furthermore, there is nothing in the record to show that defendant suffered any damages from the mix-up, or that had the car been routed as provided in the contract it would have arrived earlier in Chicago. It appears that the route over which the car travelled is 17 miles shorter than the other route.

It is also urged by defendant's counsel that plaintiff's breach of the contract of May 4, 1917, revived defendant's claim for damages instituted by plaintiff's alleged breach of the prior contract of February 8, 1916, and that the trial court erred in refusing to admit in evidence said prior contract. We do not think that the court committed error in this regard. Plaintiff did not breach the contract of May 4, 1917, but defendant first brought it in the manner shown. Furthermore, by the express provision of said contract all claims which defendant then had against plaintiff, arising out of said contract of February 8, 1916, were surrendered.

We are of the opinion that the verdict of the jury was fully sustained under the evidence and under the law and that the judgment of the Municipal Court should be affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

280 - 26454

CHICAGO & WESTERN INDIANA RAILROAD COMPANY,
Appellant,

vs.

CALUMET & SOUTH CHICAGO RAILWAY COMPANY and CHICAGO CITY RAILWAY COMPANY,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 671

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

For the reasons indicated in the opinion this day filed in case No. 26453, and entitled as above, the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes and Merrill, JJ., concur.

288 - 26462

J. H. MOOS,
Appellee,

vs.

H. A. AUSTIN COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 671

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal Court of Chicago, entered March 16, 1920, overruling defendant's motion to set aside a judgment by confession for $150 on a lease, and to allow defendant to make a defense. The judgment was entered on March 5, 1920.

Plaintiff's statement of claim alleged the execution of a lease by plaintiff to defendant of a certain room in a building at Adams street and Fifth avenue, Chicago, for a term of three years, from May 1, 1917, to April 30, 1920, at the monthly rental of $65 per month, and further alleged that the rent for the months of January and February, 1920, amounting to $130 was in arrears and unpaid. In the cognovit it was admitted that $130 was due for rent and $20 for attorney's fees. The original lease was attached to and made a part of the statement of claim but at the time the judgment order was entered leave was given plaintiff to withdraw the original lease and substitute a copy. By the sixth clause of the lease any attorney of any court of record was empowered in the lessee's name to confess judgment for any rent due under the terms of the lease, together with interest, costs and attorney's fees. On the back of the lease there was an endorsement containing *inter alia* the name of plaintiff's agents "Hool & Goodman, Building Managers," and their office address, and the words in handwriting "See *attached* lease for new tenant."

In support of defendant's motion to set aside the judgment the affidavit of G. T. Frost, secretary of defendant, was presented. It is therein alleged in substance that the Hool Realty Company is plaintiff's agent in the management of said building and during all the negotiations hereinafter mentioned was such agent; that on November 5, 1919, defendant received a notice from said Hool Company that the rent for said room would be raised from $65 to $120 per month after the termination of the lease; that "such negotiations were thereafter had between defendant and plaintiff that on December 29, 1919, the said lease was cancelled by the plaintiff and defendant in consideration that the defendant would vacate the said premises about January 1, 1920;" that defendant did vacate the premises on January 2, 1920, the first day of said month being a holiday, and surrendered the keys of the premises to the superintendent of the building at that time; that during the first week in January, 1920, plaintiff went into possession of the premises and occupied the same with office furniture and other chattels and has had the possession thereof ever since; and that defendant does not owe to plaintiff any money for any rent.

It is the law that a written lease under seal may be cancelled and surrendered by an executed parol agreement (Williams v. Vanderbilt, 145 Ill., 238, 246; Alschuler v. Schiff, 164 Ill., 298, 303); and whether there was such an executed agreement is a question of fact for a jury to determine. (Alschuler v. Schiff, 164 Ill., 298, 304; Harms v. McCormick, 30 Ill. App., 125, 128.) And while it is the rule that an affidavit in support of a motion to set aside a judgment should allege facts, as distinguished from conclusions, showing a good and meritorious defense, it is also the rule that the defendant is only required to state the ultimate facts showing such a defense. (Firestone Tire Co.

In support of defendant's motion to set aside the judgment the affidavit of E. E. Grove, secretary of defendant, was presented. It is therein alleged in substance that the Real Realty Company is plaintiff's agent in the management of said building and during all the negotiations hereinafter mentioned was such agent; that on December 2, 1929, defendant received a notice from said Real Company that the rent for said room would be raised from $85 to $100 per month after the termination of the lease; that "such negotiations were discontinued but between defendant and plaintiff that on December 28, 1929, the said lease was cancelled by the plaintiff and defendant in consideration that the defendant would vacate the premises about January 1, 1930;" that defendant did vacate the premises on January 2, 1930, the first day of said month being a holiday, and surrendered the keys of the premises to the superintendent of the building at that time; that during the first week in January, 1930, plaintiff was in possession of the premises and occupied the same with office furniture and other chattels and has had the possession thereof ever since; and that defendant does not owe to plaintiff any money for any rent.

It is the law that a written lease under seal may be cancelled and surrendered by an executed parol agreement (Killing v. Vandorbilt, 146 Ill., 239, 248; Simonton v. Mehlf, 164 Ill., 208, 209); and whether there was such an executed agreement is a question of fact for a jury to determine. (Simonton v. Mehlf, 164 Ill., 208, 209; Kamm v. Goldsmith, 90 Ill. App., 188, 189.) and while it is the rule that an affidavit in support of a motion to set aside a judgment should allege facts, as distinguished from conclusions, showing a good and meritorious defense, it is also the rule that the defendant is only required to state the ultimate facts constituting such a defense. (Atkinson Bice Co.

Ginsburg, 285 Ill., 132, 136.)

Tested by these rules we think that the trial court erred in not opening up the judgment entered by confession and allowing the defendant to make its defense. As it seems to us the defendant's affidavit was sufficient. It alleges in substance that on December 29, 1919, after negotiations had been had, the lease was cancelled on condition that the defendant vacate the premises about January 1, 1920; that on January 2, 1920 defendant vacated the premises and then surrendered the keys; and that thereafter plaintiff went into and retained possession of the premises. These allegations, if proved, would show that the parties verbally agreed that the lease should be surrendered and cancelled provided the defendant would vacate the premises about a certain date and that this agreement was thereafter executed. (Channel v. Merrifield, 286 Ill., 278, 282.) Furthermore, the fact that there was the endorsement above mentioned on the back of the original lease, which was attached to and made a part of plaintiff's statement of claim but after the judgment was entered was withdrawn and a copy substituted, suggests that a lease by the plaintiff had been made to a new tenant, thereby lending color to defendant's allegations.

For the reasons indicated the order of the Municipal Court appealed from is reversed and the cause is remanded with directions to allow defendant to defend, and for a trial upon the merits, the judgment confessed to stand in the meantime as security.

REVERSED AND REMANDED.

Barnes and Morrill, JJ., concur.

Sigmon, 48 Ill., 164, 166.)

Tested by these rules we think that the trial court erred in not opening up the judgment entered by confession and allowing the defendant to make his defense. It is seen in us the defendant's affidavit was sufficient. It alleges in substance that on December 20, 1924, after negotiations had been had, the loans was concluded on condition that the defendant vacate the premises about January 1, 1925; that on January 2, 1925 defendant vacated the premises and then surrendered the keys; and that thereafter plaintiff went into and retained possession of the premises. These allegations, if proved, would show that the parties tacitly agreed that the lease should be surrendered and cancelled prevented the defendant would receive the premises that a certain date and that this agreement was thereafter executed. (*Bennett* v. *Porterfield*, 96 Ill., 178, 182.) Furthermore, the fact that there was the endorsement above mentioned on the back of the original lease, which was attached to and made a part of plaintiff's statement of claim but after the judgment was entered was withdrawn and a copy substituted, suggests that a fraud by the plaintiff had been made in a very broad, hardly limited sense in defendant's affidavit.

For the reasons indicated the order of the municipal court appealed from is reversed and the cause is remanded with directions to allow defendant to defend, and for a trial upon the merits, the judgment confessed to stand in the meantime as security.

REVERSED AND REMANDED.

Barrett and Barrett, Atty., amicus.

350 - 26524

BELLE R. LOEB,
Appellant,

vs.

MOTOR BODY TRIMMING COMPANY, a corporation, and JESSE M. CHAUNCEY,
Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

222 I.A. 671

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago, rendered April 14, 1920, in an action of forcible detainer, finding the right of possession of the premises in the defendants. The action was tried before the court without a jury.

The following facts were disclosed from the evidence: Plaintiff, by written lease, dated April 24, 1916, demised the premises to defendants for a term of 15 years, commencing May 1, 1916 and ending April 30, 1931, reserving a monthly rental of $250, which the lessees covenanted to pay "in advance upon the first day of each and every month of said term at the office of the lessor." Defendants took possession of the premises under the lease and continued to pay each month the stipulated monthly rental up to and including the month of February, 1920. Sigmund E. Loeb was the husband of the plaintiff and acted as her agent in managing the property and collecting rents. It was the usual practice of defendants to pay the monthly rent by check to said Loeb at the premises. The rent for February, 1920, was so paid on the 17th of that month, and during the preceding seven months was so paid in some instances as late as the 9t or 10th of the month, and in others as late as the 15th or 16th of the month, and during previous years in several instances

No. - 22924

[illegible] v. [illegible],

Appellant,

vs.

MOTION NOW PENDING

[illegible], a corporation,
and [illegible] E. [illegible],

Respondents.

APPEAL FROM

MULTNOMAH COUNTY

OF OREGON.

22924.A.071

[illegible]

Duke is an appeal from a judgment of the Municipal Court of Oregon, rendered April 14, 1920, in an action of forcible detainer, finding the right of possession of the premises in the defendants. The action was tried before the court without a jury.

The following facts are transcribed from the stipulation filed in evidence herein: [illegible] the defendants to surrender possession of the premises to defendants for a term of 15 years, commencing May 1, 1914 and ending April 30, 1929, [illegible] of $250, which the lessees covenanted to pay "in advance upon the first day of each and every month of said term at the office of the lessor." Defendants took possession of the premises under the lease and continued to pay such rental the stipulated monthly rental up to and including the month of February, 1920. Edgerton E. Loeb was the husband of the plaintiff and acted as her agent in managing the property and collecting rents. It was the usual practice of defendants to pay the monthly rent by check to said Loeb at the premises. The rent for February, 1920, was paid on the 17th of that month, and during the preceding seven months was so paid in some instances as late as the 23 or 16th of the month, and in others as late as the 17th or 18th of the month, and during previous years in several instances

later than the 9th of the month. On March 9, 1920 (the rent for March, 1920, not having been paid) plaintiff caused a written notice to be served upon both defendants to the effect that she had elected to terminate the lease and did declare the same terminated "by reason of your default in the payment of rent due March 1, 1920, in accordance with the terms of said lease." Although the practice of paying the monthly rent had been as above stated, no other notice was given by plaintiff to defendants, prior to said notice of March 9th, that she desired payment of the monthly rent on the first day of each month. When the notice of March 9th was served upon the defendants by an agent of plaintiff, the defendant Chauncey, president of the defendant corporation, gave said agent the customary check for $250 for the March rent and he received it and gave it to Mr. Loeb, who refused to accept it and returned it by mail to Mr. Chauncey, and thereafter, on March 16, 1920, plaintiff commenced the present action to recover possession of the premises. At the commencement of the trial defendants tendered to plaintiff in open court the sum of $254.33, being the amount due for rent for the month of March, 1920, and interest thereon, and also the court costs, but the tender was refused. Among the provisions of the lease in question was the following:

> "Nor shall the receipt of said rent or any part thereof, or any other act in apparent affirmance of the tenancy, operate as a waiver of the right to forfeit this lease and the term hereby granted for the period still unexpired for any breach of any of the covenants herein."

Plaintiff in the trial court claimed, and her counsel here contend as grounds for a reversal of the judgment, that, by reason of the failure of defendants to pay on March 1, 1920, the rent for that month, she had the right to serve the notice of forfeiture or termination of the lease and thereby to terminate

later than the 9th of the month. On March 7, 1930 (the rent for March, 1930, not having been paid) plaintiff served a written notice to be served upon both defendants to the effect that she had elected to terminate the lease and did declare the same terminated "by reason of your default in the payment of rent due March 1, 1930, in accordance with the terms of said lease." Although the practice of paying the monthly rent had been as above stated, no other notice was given by plaintiff to defendants, prior to said notice of March 7th, that she desired payment of the monthly rent on the first day of each month. When the notice of March 7th was served upon the defendants by an agent of plaintiff, the defendant Chauncey, president of the defendant corporation, gave said agent the necessary check for $25 for the March rent and he received it and gave it to Mr. Lost, who refused to accept it and returned it by mail to Mr. Chauncey, and thereafter, on April 14, 1930, plaintiff commenced the present action to recover possession of the premises. At the commencement of the trial defendants tendered to plaintiff in open court the sum of $234.33, being the amount due for rent for the month of March, 1930, and interest thereon, and also the court costs, but the tender was refused. Among the provisions of the lease in question was the following:

> "Nor shall the receipt of said rent or any part thereof, or any other act in apparent affirmance of the tenancy, operate as a waiver of the right to forfeit this lease and the term hereby granted for the period still unexpired for any breach of any of the covenants herein."

Plaintiff in the trial court claimed, and her counsel have contended as grounds for a reversal of the judgment, that, by reason of the failure of defendants to pay on March 1, 1930, the rent for that month, she had the right to serve the notice of forfeiture or termination of the lease and thereby to terminate

the lease, and that, in view of the above quoted provision in the lease, the mere fact that defendants had usually paid, and plaintiff had received , the rent due for preceding months on or after the 9th day of said months, should not militate against her right to terminate the lease. Counsel for plaintiff in their brief here filed have cited several cases to sustain their contention but the facts of those cases are somewhat different from the facts disclosed in the present case.

Defendants in the trial court claimed, and their counsel here again urge, that the collection of the rent by plaintiff's husband for many months after the first day of each month was in effect a waiver of plaintiff's right to terminate the lease because of defendant's failure to pay the March, 1920, rent on the first day of that month; that the time and manner of collecting the rents for the preceding months were such as would necessarily induce the belief in the minds of defendants that plaintiff did not insist on the strict terms of the lease as to the time of payment of the monthly rent; and that a reasonable notice should have been given defendants of plaintiff's intention to demand in the future a strict compliance of said terms before the lease could be terminated in the manner attempted.

Under the facts disclosed in the present case, and under the law applicable thereto, we are of the opinion that the finding and judgment of the court were fully warranted. (Vider v. Ferguson, 88 Ill. App., 136, 147; Hibernian Banking Association v. Bell & Zeller Meat Co., 101 Ill. App., 581, 589; Donovan v. Murphy, 217 Ill. App., 31, 35.) In the Donovan case the action was in forcible detainer, commenced on August 9, 1919, to recover possession of certain leased premises for the reason that the lessee had failed to pay the rent for the month of August, 1919, on the first day of that month in accordance with the terms of the lease. The evidence disclosed that it had been the custom of the lessee to

the lease, and that, in view of the above quoted provision in the lease, the more fact that defendants had unusually paid, and plaintiff had received , the rent due for preceding months on or after the 5th day of said months, should not militate against that right to terminate the lease. Counsel for plaintiff in their brief here filed have cited several cases to support their contention but the facts of those cases are somewhat different from the facts disclosed in the present case.

Defendants in the trial court claimed, and their counsel here again urge, that the collection of the rent by plaintiff's husband for many months after the first day of each month was in effect a waiver of plaintiff's right to terminate the lease because of defendant's failure to pay the rent, 1500, rent on the first day of that month; that the time and manner of collecting the rents for the preceding months were such as would necessarily induce the belief in the minds of defendants that plaintiff did not insist on the strict terms of the lease as to the time of payment of the monthly rent; and that a reasonable notice should have been given defendants of plaintiff's intention to demand in the future a strict compliance of said terms before the lease could be terminated in the manner attempted.

Under the facts disclosed in the present case, and under the law applicable thereto, we are of the opinion that the finding and judgment of the court were fully warranted. (Kimmel v. Hoffman, 88 Ill. App., 146, 147; Bierbaum Building Association v. Bell & Miller Clay Co., 141 Ill. App., 184, 187; Bonnell v. Bonnell, 25 Ill. App., 81, 85.) In the Bierbaum case the action was in forcible detainer, commenced on March 2, 1908, by the owner (landlord) of certain leased premises for the reason that the lessee had failed to pay the rent for the month of August, 1907, on the first day of that month in accordance with the terms of the lease. The evidence disclosed that it had been the custom of the lessee to

pay the monthly rent on or about the 10th day of each month, and the rent for the month of July, 1919, was paid by check on the 10th day of that month. No previous notice was given to the lessee of the lessors' intention to demand compliance with the strict terms of the lease relative to the payment of the rent. The lessee was led to believe by the past dealings that payment by the 10th day of each month would be a sufficient compliance of his covenant to pay rent. It was provided in the lease that the lessee waived his right to notice of the lessors' election to declare the term ended upon default of any of the provisions therein. The trial court entered a judgment in favor of the lessors. In reversing the judgment and remanding the case, the main appellate court of the first district in its opinion said (p. 35):

> "Construing the lease as modified by the admitted conduct of the parties, the plaintiffs had no legal right, as a matter of law, to bring the action on August 9, 1919. Under the circumstances, notwithstanding the provisions of the lease with respect to notice, it was the duty of the plaintiffs to notify the defendant of the intention to insist upon a strict compliance with the terms of the lease as written, and the plaintiffs were not justified by a mere secret mental operation in declaring forfeited the rights of the defendant under the lease. Hamer v. Butterly, 189 Ill. App., 79. The courts are quite ready to take hold of any reasonable circumstances which show an intent to waive a forfeiture. Jakes v. North American Union, 186 Ill. App., 7. The rule which is to be applied in the present case is founded upon reason and justice. Where a lessee has been led by the conduct of the lessor to believe that a strict compliance with the terms of the lease will not be insisted upon, it would be manifestly unfair to permit a forfeiture of the lessee's right under the lease because of the lessee's failure to strictly comply with such terms."

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes and Morrill, JJ., concur.

may the monthly rent on or about the 15th day of each month, and the rent for the month of July, 1919, was paid by check on the 15th day of that month. No previous notice was given to the lessee of the lessors' intention to demand compliance with the strict terms of the lease relative to the payment of the rent. The lessee was led to believe by the past dealings that payment by the 15th day of each month would be a sufficient compliance of his covenant to pay rent. It was provided in the lease that the lessee waived his right to notice of the lessors' election to declare the term ended upon default of any of the provisions therein. The trial court entered a judgment in favor of the lessors. In reversing the judgment and remanding the case, the main appellate court of the first district in its opinion said (p. 72):

> "Continuing the lease as modified by the admitted conduct of the parties, the plaintiffs had no legal right, as a matter of law, to bring the action on August 5, 1919. Under the circumstances, notwithstanding the provisions of the lease with respect to waiver, it was the duty of the plaintiffs to notify the defendant of the intention to insist upon a strict compliance with the terms of the lease as written, and the plaintiffs were not justified by a mere secret mental speculation in declaring forfeited the rights of the defendant under the lease. Lemar v. Hutchinson, 248 Ill. App., 79. The courts are quite ready to take hold of any reasonable circumstances which show an intent to waive a forfeiture. Jones v. North American Union, 268 Ill. App., 7. The rule which is to be applied in the present case is founded upon reason and justice. There is issue now been led by the conduct of the lessor to believe that a strict compliance with the terms of the lease will not be insisted upon, it would be manifestly unfair to permit a forfeiture of the lessee's right under the lease because of the lessee's failure to strictly comply with such terms."

The judgment of the municipal court is affirmed.

AFFIRMED.

Barnes and Martill, JJ., concur.

436 - 26610

JOHN O. KELLY, Appellee, v. JOHN STAMOS, JIM STAMOS and NICK STAMOS, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 671

MR. PRESIDING JUSTICE GRINNEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $100 of the Municipal Court of Chicago rendered upon the verdict of a jury against the defendants.

In plaintiff's statement of claim, filed July 3, 1919, he alleged in substance that defendants operated the Washington Hotel in Chicago, Illinois; that prior to June 1, 1919, he had been a roomer in the hotel; that on or about June 1st he went away from the city, owing defendants $22.50 for room rent; that defendants took possession of his trunk as security for said sum and promised to safely keep the trunk until his said indebtedness was paid; that on July 1, 1919, he paid defendants a part of said indebtedness and, upon permission given, he inspected the contents of the trunk and found various articles, wearing apparel, etc., missing; and that the value thereof was $164.25, which sum he has requested defendants to pay him but that they have refused so to do.

In defendants' affidavit of merits they stated that they did not at any time promise to safely keep the trunk; that they were merely bailees without reward of the trunk; that if any of the articles mentioned had been taken or removed from the trunk it was without any fault or negligence or breach of contract on defendants' part; and that they were not liable to plaintiff in any sum.

On the trial plaintiff was the only witness in his own behalf, the defendant, James Stamos, and the housekeeper of the hotel,

Anna Gross, and two police officers of the City of Chicago testified on defendants' behalf. Plaintiff's testimony was to the effect that about June 1, 1919, when he left Chicago to go to Michigan, he gave up his room and asked James Stamos if the hotel would take care of his trunk until his return; that Stamos replied that the hotel would do so and hold the same as security for the indebtedness of $22.50; that plaintiff then checked up the contents of the trunk, made a list of the articles and locked the trunk and delivered it to the housekeeper; that upon his return on July 1, 1919, he paid $16.00 on account of said indebtedness and, upon request was allowed access to the trunk, which he found still locked and in a closet; and that he opened the trunk, again checked over the contents and found that certain wearing apparel and other chattels, all of the value in his estimation of $164.25, were missing. James Stamos testified that when plaintiff, about the time of his departure on June 1st, asked him if he (plaintiff) might leave his trunk with the hotel until his return, he (Stamos) replied that he could do so at his own risk and that the hotel would not assume any responsibility; and that plaintiff said "all right." Anna Gross, the housekeeper, testified that she saw the trunk when plaintiff left the hotel; that it was locked and was put in a closet, the door of which was also locked; that she saw the trunk when plaintiff returned, and that it was then locked and was in the same place and in the same condition as when plaintiff left; that she was present at the conversation had between plaintiff and James Stamos relative to the former leaving the trunk with the hotel and that at that time "Mr. Stamos said, 'you leave it at your own risk.'"

After a review of the entire testimony as contained in the abstract, we are of the opinion that the judgment cannot stand. When plaintiff gave up his room and left Chicago he ceased to be

Anna Green, and two police officers of the City of Chicago testified on defendants' behalf. Plaintiff's testimony was to the effect that about June 1, 1919, when he left Chicago to go to Michigan, he gave up his room and asked James Hamson if the hotel would take care of his trunk until his return; that Hamson replied that the hotel would do so and hold the same as security for the indebtedness of $28.80; that plaintiff then examined the contents of the trunk, made a list of the articles and locked the trunk and delivered it to the housekeeper; that upon his return on July 1, 1919, he paid $16.00 on account of said indebtedness and, upon request was allowed access to the trunk, which he found still locked and in a closet; and that he opened the trunk, again checked over the contents and found that certain wearing apparel and other articles, all of the value in his evidence of $484.58, were missing. These witnesses testified that when plaintiff, about the time of his departure on June 1st, asked him if he (plaintiff) might leave his trunk with the hotel until his return, he (Hamson) replied that he would do so at his own risk and that the hotel would not assume any responsibility; and that plaintiff said "all right." Anna Green, the housekeeper, testified that she saw the trunk when plaintiff left the hotel; that it was locked and was put in a closet; the door of which was also locked; that she saw the trunk when plaintiff returned, and that it was then locked and was in the same place and in the same condition as when plaintiff left; that she was present at the conversation had between plaintiff and James Hamson relative to the former leaving the trunk with the hotel and that at that time "Mr. Hamson said, 'you leave it at your own risk.'"

After a review of the entire testimony on examination in the abstract, we are of the opinion that the judgment cannot stand. When plaintiff gave up his room and left Chicago he ceased to be

a lodger in the hotel. It clearly appears that he requested permission to leave his trunk in the care of the hotel until his return, which permission was granted upon condition that the trunk should remain in the hotel at his own risk. The defendants, as proprietors of the hotel, were mere gratuitous bailees, and the evidence discloses that neither they nor their servants were guilty of any negligence. Furthermore there was testimony to the effect that defendants employed competent and trustworthy help to handle baggage. Under the circumstances the defendants are not liable for the loss of the articles contained in the trunk, as claimed by plaintiff. (Miles v. International Hotel Co., 289 Ill. 320.)

The judgment of the Municipal Court is reversed.

REVERSED.

BARNES and MORRILL, JJ., concur.

436 - 26610

FINDING OF FACTS. We find as facts in this case that the trunk in question was left with defendants for plaintiff's accommodation and at his own risk and that defendants were not guilty of any negligence proximately contributing to the loss of certain articles in the trunk, as claimed by plaintiff.

166 - 26335

MERCHANTS NATIONAL FIRE INSURANCE COMPANY, a corporation,
Appellee,

vs.

FRANK R. THOMPSON et al.,

On appeal of FRANK R. THOMPSON,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

222 I.A. 671

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee filed its bill against appellant asking for the cancellation of its note for $5,725 payable to appellant's order, and of 236 shares of appellee's capital stock issued to appellant, and for an accounting. Appellant filed his cross bill asking that appellee be decreed to pay him $17.33 per share for said stock with interest, and the amount of said note with interest, less a conceded indebtedness of $2,087.52, and for such relief as the nature of the case may require.

The issues were referred to a master in chancery who found that appellant was entitled to judgment for $5,511.69 on said note less an indebtedness of $2,018.76, and to specific performance of said alleged contract, which provided for the repurchase by appellee of said stock at said price per share. Appellee's objections to the master's report were overruled and stood as exceptions thereto. The findings of the master were stated in the decree to be approved in part and disapproved in part. The chancellor expressly found that complainant was entitled to have said note cancelled as null and void and that appellant was entitled to a decree confirming his title to said stock but not entitled to a specific performance to purchase the same, and as a net result appellant was indebted to appellee

MR. JUSTICE HOWES DELIVERING THE OPINION OF THE COURT.

Appellee filed its bill against appellant seeking for the cancellation of its note for $6,725 payable to appellant's order, and of 336 shares of appellee's capital stock issued to appellant, and for an accounting. Appellant filed its cross bill asking that appellee be decreed to pay him $17,.32 per share for said stock with interest, and the amount of said note with interest, less a conceded indebtedness of $4,187.32, and for such relief as the nature of the case may require.

The issues were referred to a master in chancery who found that appellant was entitled to judgment for $8,411.69 on said note less an indebtedness of $2,012.76, and to specific performance of said alleged contract, which provided for the repurchase by appellee of said stock at said price per share. Appellee's objections to the master's report were overruled and stood as exceptions thereto. The findings of the master were adopted in the decree to be approved in part and disapproved in part. The chancellor expressed from that evidence was entitled to have said note cancelled as null and void and that appellant was entitled to a decree confirming his title to said stock but not entitled to a specific performance to enforce the same, and as a per sonal remedy appellant was limited to claims

in the sum of $291.99. From a decree in accordance with these findings this appeal was taken, and appellee has filed cross-errors.

The main facts out of which the controversy arose are as follows:

In the fall of 1915, appellee, a fire insurance company of this State with assets then of about $217,400.75, was confronted with the necessity of acquiring additional capital or quitting business, and to obtain such capital sought consolidation with the Anglo-American Insurance Company, also a fire insurance corporation of this State, whereby it would acquire the latter's assets amounting, as then estimated, to $213,279.36. The plan contemplated a merger of the latter company into the former with increased capital and stock. For brevity we shall refer to these companies as the Merchants National and Anglo-American, respectively.

A proposition and tentative contract for such consolidation were submitted to the board of directors of the Merchants National, and the board passed a resolution appointing a special committee composed of its president, Bresee, and other directors, and authorizing them "to close the deal." The active work of the committee seems to have been left entirely to Bresee by its other members and he entered into an agreement for Thompson's services in effecting such consolidation. This agreement was subsequently put in writing by ---------- Thompson in the form of a proposition to him from the Merchants National, to which was appended his acceptance. He left it with Bresee to be signed by him, but Bresee kept it without signing it. Both parties, however, proceeded to act under it as hereinafter stated.

By its terms appellant was employed as appellee's

in the sum of $250,000. Upon a decree in accordance with these findings this appeal was taken, and Appellee has filed cross-assignments.

The main facts out of which the controversy arose are as follows:

In the fall of 1910, appellee, a fire insurance company of this state with assets than of above $[illegible],000, was confronted with the necessity of obtaining additional capital or quitting business, and to obtain such capital sought association with the defendant in insurance business, also a fire insurance corporation of this state, whereby it would acquire the latter's stock ownership, at then quoted, to $[illegible],000.00. The plan contemplated a merger of the latter company into the former with increased capital and stock. For brevity we shall refer to these companies as the Scottsdale National and Anglo-American, respectively.

A preliminary and tentative agreement for such association was submitted to the board of directors of the Scottsdale National, and the board passed a resolution approving a special meeting called of its stockholders, [illegible] when directors, and authorizing them "to close the deal." The active work of the committee seems to have been left entirely to Duncan by the other members and he entered into an agreement for Thompson's services in effecting such association. This agreement was subsequently put in writing by [illegible] Thompson in the form of a proposition to him from the Scottsdale National, to which was appended his signature. It [illegible] was agreed to be signed by him, but Duncan kept it without signing it. Both parties, however, proceeded to act under it as binding after signed.

By his final opinion was entered in Appellee's

agent to negotiate for the transfer of the property and assets of the Anglo-American to appellee and for their consolidation. For his services he was to receive five per cent of the total value of the assets of the Anglo-American as accepted by appellee at the time of ratification, one-fifth in cash and four-fifths in shares of the increased capital stock of appellee, and appellee agreed that it would within six months from consolidation purchase such shares at not less than their ascertained value at the time of issue, which was $17.22 per share.

The plan of consolidation was formulated by Thompson and subsequently approved of by the board of directors, and also at a special meeting of the stockholders. It contemplated that the stockholders of the Anglo-American should exchange their stock on a basis of its book value for increased capital stock of appellee upon consolidation. An obstacle to carrying out this plan arose by the refusal of a group of Anglo-American stockholders (called the Merrick group) to take stock in the consolidated company, so that to effectuate a transfer of the Anglo-American assets it became necessary, if the consolidation and merger were to be effected, to purchase their shares for the sum of $91,025, the estimated value of such stock on the basis of the merger, and a contract for such purchase at such price was entered into between appellee and said stockholders on December 16, 1915, which was subsequently executed by issuing the stock to Bresee as a matter of convenience. This contract was entered into before the board of directors approved of the plan of consolidation.

To carry out such contract Bresee borrowed money from the bank upon the note of the Merchants National, guaranteed by other directors of the company, and acting in the interests of the consolidation and for the benefit of the Merchants National he, by means of such purchased stock and that of the other

agent to negotiate for the transfer of the property and assets of the Anglo-American to Apollinaire and for their amalgamation, but his services he was to receive five per cent of the total value of the assets of the Anglo-American is accepted by Apollinaire at the time of amalgamation, one-fifth in cash and four-fifths in shares of the increased capital stock of Apollinaire, and Apollinaire agrees that it would within six months from amalgamation produce such shares at not less than their assessed value at the time of issue, which was $27.50 per share.

The plan of amalgamation was formulated by Thompson and subsequently approved of by the board of directors, and also at a special meeting of the shareholders. It contemplated that the stockholders of the Anglo-American should exchange their stock in a basis of its fair value for increased original issue of Apollinaire upon amalgamation. An obstacle to carrying out this plan arose by the refusal of a group of Anglo-American stockholders (called the Barrick group) to take stock in the amalgamated company, on that in effectuating a transfer of the Anglo-American assets it became necessary, if the amalgamation was perfect was to be effected, to purchase their shares for the sum of $27,000, the estimated value of such stock on the basis of the merger, and a contract for such purchase at such price was entered into between Apollinaire and said stockholders on December 14, 1911, which was subsequently revoked by leaving the stock in Bruce as a matter of convenience. This contract was entered into before the board of directors approved of the plan of amalgamation.

In early and such capital Bruce returned issue from the book upon the note of the Marchmont Minimum, guaranteed by their directors of the company, and acting in the interests of the amalgamation and for the benefit of the Marchmont Minimum Co., by means of such purchased stock and that of the other

stockholders of the Anglo-American working with him, obtained control of the latter company and thereby became its president, and its other offices were filled by officials of the Merchants National. In this manner the officials of the latter company obtained possession of the assets of the Anglo-American.

In order to pay the note to the bank Bresee took bonds of the Anglo-American aggregating in value $91,025, sold them to the bank, and to that extent the assets of the Anglo-American were depleted when formally turned over to the Merchants National. Afterwards, however, there was a substitution therefor of securities of equal value by certain stockholders of the Merchants National for which they took the shares of stock that under the original plan would have been exchanged for the Anglo-American stock held by the Merrick group. So while the original plan, which contemplated all the stockholders of the Anglo-American should become stockholders of the Merchants National and that the assets of the Anglo-American should be turned over to the latter company in their entirety, was not carried out in all of its details, the result was practically the same in that the Merchants National received the full benefits contemplated by such merger and had the same capital and assets in value as if the original plan had been carried out. The master so found and we think, correctly, and it therefore seems immaterial to the issues of this case whether the original plan was adhered to in all its details so long as the consolidation, the main object, was effected in a way apparently satisfactory to the stockholders, and the practical results were the same.

After the consolidation was thus effected the compensation which Thompson was to receive under said contract was finally adjusted by Bresee's delivering to him appellee's said note for $5,725, and issuing to him said 236 shares of its stock.

It is not questioned that Thompson formulated the plan

stockholders of the Anglo-American working with him, obtained control of the latter company and thereby become its president, and its other officers were filled by officials of the Metropolis National. In this manner the officials of the latter company obtained possession of the assets of the Anglo-American.

In order to pay the note to the Bank Thomas took bonds of the Anglo-American exchanging in value $23,000, said them to the bank, and to that extent the assets of the Anglo-American were depleted with financially interest of the Metropolis National. Afterwards, however, there was a substitution therefor of securities of equal value by certain stockholders of the Metropolis National for which they took the shares of stock that under the original plan would have been exchanged for the Anglo-American stock held by the Metropolis group. So while the original plan, which contemplated all the stockholders of the Anglo-American stock being stockholders of the Metropolis National and full the assets of the Anglo-American should be turned over to the latter company as such entity, and not minimal and in all of its details, the result was practically the same in that the Metropolis National received the full benefits contemplated by such merger and had the same capital and assets in value as if the original plan had been carried out. The matter as found and we think, correctly, and it therefore seems immaterial to the issues of this case whether the original plan was adhered to in all its details as long as the consolidation, the main object, was effected in a way substantially satisfactory to the stockholders, and the practical results were the same.

After the consolidation was then effected the transaction which Thompson was to receive under said contract was finally adjusted by Jones's delivering to him applicant's note for $6,750, and issuing to him said 500 shares of the stock.

It is not questioned that Thompson formulated the plan

adopted by the board of directors and the stockholders, or that he rendered efficient services in effecting the consolidation by securing, or aiding in securing, an exchange of stock with all the stockholders of the Anglo-American, except the Herrick group, and the contract with the latter for the transfer of their stock. So far, therefore, as the obligations of appellee to appellant under the contract in question are concerned they do not seem to be affected by the modified plans and means by which the merger was consummated.

The master found that appellant was entitled to recover the amount of the note less $213.31 and appellant's conceded indebtedness, and to a specific performance of the contract of appellee to repurchase the 236 shares of stock at the rate of $17.22 per share.

Appellant questions the master's findings only as to the deduction of $213.31. We shall not discuss this item, approving of the master's findings with regard thereto.

The chancellor held that appellant was entitled to such stock but not to a specific performance for its repurchase, and that the note was null and void. But the decree is based on appellant's right to compensation on the agreed basis of 5 per cent on the agreed value of the Anglo-American assets after deducting therefrom $91,025, the value of the bonds so used to pay appellee's note to the bank.

Appellee contends that the decree should have given the relief asked for by its bill, and to that end urges that the contract made by Breese with Thompson was without authority of the board of directors and invalidated by fraud, and that in no event was appellant entitled to 5 per cent on the $91,025 as a part of the Anglo-American assets.

It is apparent that neither the master nor the chancellor agreed with appellee's contention with regard to

adopted by the board of directors and the stockholders, or that he rendered efficient services in effecting the consolidation by securing, or aiding in securing, an exchange of stock with all the shareholders of the Mult-Bowlers, always the majority group, and was entirely with the latter for the benefit of their stock. He far, therefore, as the ability-claims of appellee to appellant under the contract in question are concerned they do not seem to be affected by the modified plans and terms by which the project was consummated.

The master found that appellant was entitled to recover the amount of the note less $213.32 and appellant's counsel insistedness, and to a specific performance of the contract of appellee to repurchase the 750 shares of stock at the rate of $17.37 per share.

Appellant questions the master's findings only as to the deduction of $213.32. We shall not discuss this item, appearing of the material findings with respect thereto.

The chancellor held that appellant was entitled to such stock but not to a specific performance for its repurchase, and that the note was null and void. But the decree in behalf of appellant's rights to compensation on the agreed basis of 5 per cent on the agreed value of the Triple-Bowlers assets after deducting therefrom $93,828, the value of the bonds to need to pay appellee's note to the bank.

Appellee contends that the Green should not give the relief asked for by its bill, and to that end urges that the contract made by Green with Thompson was without authority of the board of directors and invalidated by fraud, and that in no event was appellant entitled to 5 per cent on the $93,828 as a part of the Triple-Bowlers assets.

It is apparent that neither the master nor the chancellor agreed with appellee's contentions with regard to

want of authority to make the contract in question. The services thus contracted for could, we think, be properly regarded as within the scope of appellee's business on its taking lawful steps to increase its capitalization. The plan to that effect was agreed to by the board of directors, and to carry it out required the assent of each stockholder of the Anglo-American Company. The stockholders of that company were numerous and scattered and much work was required to present to them the contemplated plan and to procure their individual assent to part with their stock. Presumably it was not expected that all these preliminary steps should be taken by the individual members of the committee appointed "to close the deal," and as Thompson's services were contracted for to attend to such details, we think his employment for such purpose was reasonably within the purview of the authority given to said committee, if not strictly in the line of the company's business. If it was in the line of its business then it was seemingly within the power of Bresee as its president to attend to these necessary details for carrying out the authorized plan. It is immaterial, therefore, whether the authority emanated directly from the resolution appointing said committee or from the implied power of the president, if from one or the other such authority may be inferred, as we think can be done from the facts and circumstances stated.

The contention as to fraud rests mainly on evidence introduced by complainant tending to show that Thompson entered into an arrangement with Bresee for a commission of ten per cent instead of five, and to divide the same with Bresee. Both the findings of the master and the chancellor are against this contention and are based, presumably, upon evidence deemed a satisfactory explanation of circumstances that otherwise would

be suspicious. Hence we are not disposed to discuss them. Nor do we agree with appellee's contention that the contract in question was vitiated by an alleged misleading notice prepared by appellant, or sent out with his knowledge, to appellee's stockholders which is interpreted by appellee as overstating the aggregate assets of the two companies.

While the chancellor, for some reason not clearly apparent, held that the note was null and void, he at the same time confirmed appellant's title to the stock. If under the contract appellant was entitled to one he seemingly was to the other. The decree, however, apparently recognizes appellant's right under the contract to the benefit of his contract for a commission but differs from the master's finding as to the principal upon which it should be computed. That difference consists in deducting from the value of the entire assets of the Anglo-American said sum of $91,025. This apparently was upon the theory that appellee did not get the benefit of the entire assets of the Anglo-American. In this we do not concur. While appellee did not get the actual bonds valued at $91,025 it got through and by their use an equivalent in value, as above stated. Through such use the stock that otherwise would have been issued to the Herrick group practically became treasury stock and as such was exchanged for securities of the value of such bonds, and so resulted in the same financial benefits to appellee contemplated by the consolidation as if the original plan had been carried out. We do not think, therefore, it can justly be contended that appellant was not entitled to his five per cent of the entire value of the Anglo-American assets of which appellee thus got the benefit. In the adjustment of his agreement therefor he took said note and said stock in lieu of cash on the express condition of later substitution of cash for the stock. The agreement in effect gave appellee an exten-

sion of time to pay the agreed amount of the commission. The note and the stock, as valued, together equaled the amount of the commission at five per cent on the original estimated value of the Anglo-American assets. The recommendations of the master were in effect to allow appellant such amount with interest less $213.31 on account of shrinkage of said assets, as subsequently ascertained. And we think appellant is justly and equitably entitled thereto.

As equity observes substance and not form it makes no practical difference whether appellee be decreed to pay appellant said amount with interest or whether it be decreed to pay said note with interest and to take back said stock at the agreed value of $17.22 with interest. The result in figures would be the same, and in either event appellant would be required to surrender the note for cancellation and to return the stock to the company.

In this view of the case we need not discuss the doctrine of specific performance, or whether appellee can legally contract to buy back its stock. If an insurance company organized under the laws of this State cannot be specifically enforced to comply with its agreement to buy its own stock it can be required to pay its lawful debt, and it is inequitable that it should be relieved therefrom because of a legal inability to comply with a condition as to the form of paying it.

We think, therefore, the equities are with appellant and that the decree should be reversed with directions to enter a decree in conformity with this opinion dismissing the bill for want of equity, and entering a decree in appellant's favor as recommended by the master requiring appellee to pay the amount of his commission at five per cent on the basis calculated by the master with interest from the time due, appellant being required to surrender said note and the stock in question.

Gridley, P.J. and Morrill, J. concur. REVERSED AND REMANDED WITH DIRECTIONS.

cion of time to pay the agreed amount of the commission. The
rate and the study, or volume, negotiate-special the amount
of the commission at five per cent on the original estimated
value of the single-premium annuity. The recommendations of
the master were in effect to allow applicants such amounts with
interest less $2,000.00 on account of shrinkage of said annuity,
as mathematically ascertained. Let me (line specialist in partly
and especially mailing therein.

In equity absurdum substance and not form it makes no
practical difference whether applicant be deemed to pay applicant
said amount with interest or whether it be deemed to pay said
note with interest and to take back said stock at the agreed value
of $27,00 with interest. The result in figures would be the same,
and in either event applicant would be required to surrender the
note for cancellation and to return the stock to the company.

In this view of the case we need not discuss the
doctrine of specific performance, or whether applicant can legally
contract to buy back its stock. If an insurance company organized
under the laws of this state cannot be specifically enforced to
comply with its agreement to buy its own stock it can be required
to pay its legal debt, and it is inconceivable that it should be
relieved therefrom because of a legal inability to comply with a
condition so to the form of paying it.

We think, therefore, the equities are with applicant
and that the decree should be reversed with directions to enter
a decree in conformity with this opinion directing the bill for
want of equity, and entering a decree in applicant's favor as
recommended by the master requiring applicant to pay the amount of
his commission at five per cent on the basis calculated by the
master with interest from the time for applicant which expired
on surrender said note and the stock in question.

Grigsby, P.J., and Morrill, J., REVERSED AND REMANDED WITH DIRECTIONS.

322 - 26496

LOUISE C. GREENFIELD,
Appellee,

vs.

JOSEPH FAKAN,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

222 I.A. 672

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit for personal injuries resulting from a collision between two automobiles at a street intersection. The one in which plaintiff was riding (referred to as a Ford car) was going north on the east side of the street, and defendant's automobile (referred to as a limousine) was going east on the south side of the street. Plaintiff was a guest of the driver of the former and sat in the rear seat. As the car in which she was riding approached the intersection she saw the other automobile approaching from the west. Plaintiff contended that the Ford car was the first to enter the street intersection and that defendant's car ran into it, and defendant that his car was the first to enter the intersection and that the Ford car ran into its front side. Each claimed negligence of the other so far as speed was concerned. But it is unnecessary to enter further into the facts of the case as under the authorities we think one of the given instructions requires us to reverse the judgment and remand the cause for a new trial.

The plaintiff offered the following instruction:

> "The jury are instructed that if you find from the evidence that the plaintiff was a guest in an automobile, and if you further find that she had no right of control over the automobile or its driver and exercised no control over either, then and under such circumstances it would be no defense for defendant, Fakan, if you find that plaintiff is otherwise entitled to recover, for him to prove that the driver of the automobile in which plaintiff was riding was guilty of negligence contributing to the accident."

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This is a suit for personal injuries resulting from a collision between two automobiles at a street intersection. The case in which plaintiff was riding (referred to as a Ford car) was going north on the east side of the street, and defendant's automobile (referred to as a limousine) was going east on the south side of the street. Plaintiff was a guest of the driver of the Ford car and sat in the rear seat. As the car in which she was riding approached the intersection she saw the other automobile coming from the west. Plaintiff contended that the Ford car was the first to enter the street intersection and that defendant's car ran into it, and defendant that his car was the first to enter the intersection and that the Ford car ran into the front side. Each claimed negligence of the other so far as speed was concerned. But it is unnecessary to enter further into the facts of the case as under the evidence we think one of the given instructions requires us to reverse the judgment and remand the cause for a new trial.

The plaintiff offered the following instruction:

> "The jury are instructed that if you find from the evidence that the plaintiff was a guest in an automobile, and if you further find that she had no right of control over the automobile or its driver and exercised no control over either, then and under such circumstances it would be no defense for defendant, if you find that plaintiff is otherwise entitled to recover, for him to prove that the driver of the automobile in which plaintiff was riding was guilty of negligence contributing to the accident."

To this instruction the court added the following:

"Providing that the plaintiff herself at the time of the accident was in the exercise of ordinary care for her own safety."

It is not questioned that the burden of proof rested on plaintiff to prove as an element in her cause of action the exercise of ordinary care for her own safety notwithstanding she was a mere passenger. (Pienta v. Chicago City Ry. Co., 284 Ill., 246; Ogg v. Dryer, 294 Ill., 538; Parrott v. Chicago Railways Co., decided by the Supreme Court at the November term, 1921.) In the decisions referred to it is held to be the duty of a passenger where he has an equal opportunity with the driver to observe and avoid danger not to omit any reasonable efforts on his part to avoid danger. Whether plaintiff under the circumstances of the case was called upon to do anything in particular to avoid danger or was in anywise negligent, was a question of fact for the jury. While but for the instruction in question we might not disturb the jury's conclusion thereon, yet the real question presented is whether it was not error to limit the exercise of care on her part "to the time of the accident" instead of at and just before the time of its happening.

Appellant contends that if it is incumbent upon a passenger having the opportunity to observe conditions of danger to warn the driver thereof, then such duty may, and generally will, arise before the precise time of the accident, and that as the evidence in this case discloses that the approaching limousine was visible to plaintiff all the time from before it reached the intersection until the collision, the duty to exercise care on her part arose before the time of the accident, and hence the limitation in the instruction to the "time of the accident" was error. The cases of Krieger v. A. L. & S. R. R. Co., 242 Ill., 544; Village of Lockport v. Licht, 221 Ill., 35; Bale v. Chicago Junction Railway Co., 259 Ill., 476, and others are cited in

To this instruction the court added the following:

> "Proceeding that the plaintiff herself at the time of the accident was in the exercise of ordinary care for her own safety."

It is not questioned that the burden of proof rested on plaintiff to prove as an element in her cause of action the exercise of ordinary care for her own safety [illegible] who was injured thereby. Lehnen v. Illinois City Co., 64 Ill., 499; Cox v. Ryan, 204 Ill., 498; Kenyon v. Chicago Railway Co., decided by the Appellate Court in the September term, 1904.) In the instant reference to it is held to be the duty of a passenger where he has an equal opportunity with the driver to observe and avoid danger not to omit any reasonable efforts on his part to avoid injury. Neither plaintiff nor the witnesses of the case who called upon to be anything in particular in avoid danger or was in anyone negligent, was a question of fact for the jury. While but for the instruction in question we might not disturb the jury's verdicts therein, yet the real question presented is whether it was not error to limit the exercise of care on her part "at the time of the accident" instead of at and just before the time of its happening.

Appellant contends that if it is incumbent upon a passenger having the opportunity to observe conditions of danger to warn the driver thereof, then such duty may, and particularly will, arise before the precise time of the accident, and that on the evidence in this case indicates that the approaching locomotive was visible to plaintiff all the time from before it reached the intersection until its collision, the duty to exercise care on her part arose before the time of the accident, and hence the limitation in the instruction to the "time of the accident" was error. The cases of Pittsburg v. [illegible] 4 N. E. 78, 58 Ill., 248 Ill., 1; Village of Lockport v. Lidke, 222 Ill., 34; Mack v. Chicago Junction Railway Co., 192 Ill., 272, and others are relied on

support of the doctrine. A strict adherence to the rule laid down in these cases, taken in connection with what the Supreme Court has said with respect to the duty of a passenger in an automobile, and with the allegation in the declaration that plaintiff was in the exercise of such care "while the automobile was being operated at or near" the place of intersection, compels us to hold that the instruction was erroneous in limiting the question of plaintiff's care to the precise time of the accident. Accordingly we must reverse and remand the cause for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

344 - 26513

MARY A. CASSIDY, administratrix of the estate of THOMAS CASSIDY, deceased,

Appellee,

vs.

CITY OF CHICAGO et al.,

Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

222 I.A. 672

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The judgment appealed from was rendered against the City of Chicago in an action charging negligence in allowing a certain sidewalk to be and remain in a dangerous condition whereby appellee's deceased, Thomas Cassidy, fell therefrom into the basement of a building in the process of construction and received injuries resulting in his death. The other defendants, to whom a permit was issued to erect the building, were dismissed out of the case.

The basement was about 10 feet deep surrounded by a brick wall, and was partially covered by a floor, leaving an uncovered space, however, about 2½ feet by 20 feet long, along the wall close to the line of the sidewalk in question. The top of the wall was slightly below the level of the street. An old sidewalk along the same had been taken up, and where earth adjoining the wall had caved in the space had been filled up with sand. On orders of a city policeman loose planks were laid lengthwise over this sand, which was described as uneven and lumpy and as sloping toward said basement at its uncovered part so that the planks moved or wobbled when walked on. The inference from the evidence is that appellee's intestate while walking thereon after dark fell into said uncovered space. Bricks were piled into a wall several feet wide and high along

the outer edge of the sidewalk for the entire side of the building where the accident occurred, which tended to obstruct the artificial light on the street. The evidence was to the effect that it made the passageway dark, that no red light was placed at or near the same, as specifically required under the city's ordinances, and that it was kept open for public travel at night without such lights or a railing or a barricade along said open space.

These conditions seem to have been known to city inspectors whose duty called them daily to the scene of the accident during building operations. No action seems to have been taken on the part of the city to safeguard the public using the sidewalk in that condition. That there was negligence on the part of the city in this respect does not seem to be questioned.

The points made on this appeal are that appellee failed to establish that her intestate was in the exercise of ordinary care for his own safety, and that the court erred in excluding certain evidence offered by appellant.

Appellee made a prima facie case of the exercise of ordinary care, there being no eyewitness to the accident, by proof that the intestate was a man of sober, industrious and careful habits, and also presented proof that he was not, as claimed by appellant, under the influence of liquor at the time of the accident. The controversy on this point arises largely over the weight to be given to the evidence bearing upon said intestate's condition when discovered about midnight on the floor of the basement directly underneath said open space. Police officers who assisted in removing him testified to circumstances tending to show that the intestate had been drinking liquor. They claimed to have detected its odor on his breath and from his vomit, and said he appeared to be under its influence. On the

the outer edge of the sidewalk for the entire side of the building where the accident occurred, which tended to obstruct the artificial light on the street. The evidence was to the effect that it made the passageway dark, that no red light was placed at or near the case, or specifically required under the city's ordinances, and that it was kept open for public travel at night without such light or a railing or a protective stand-pipe over them.

These contentions seem to have been known to city inspectors when duty called them daily to the scene of the accident during building operations. No notice seems to have been taken on the part of the city to safeguard the public using the sidewalk in this condition. That there was negligence on the part of the city in this respect does not seem to be questioned.

The points made on this appeal are that sufficient facts to establish that her knowledge was in the exercise of ordinary care for his own safety, and that the court erred in excluding material evidence offered by appellant.

Appellee made a motion for a nonsuit upon of the grounds of ordinary care, there being no evidence to the contrary, by proof that the intestate was a man of sober, industrious and careful habits, and also presented proof that he did not, in claims by appellant, under the influence of liquor at the time of the contract. The sufficiency of this point raised largely over the weight to be given to the evidence bearing upon such intestate's condition when discovered about midnight on the floor of the basement directly underneath said open space. Police officers was assisted in removing his testified to circumstances tending to show that the intestate had been drinking liquor. They claimed to have detected the odor on his breath and from his vomit, and said he appeared to be under its influence. On the

the other hand, evidence was offered of his habit of sobriety and to the effect that the post mortem examination held two days later disclosed no evidence of alcohol in the system. We need not review the testimony on this subject. The question of fact presented was particularly one for a jury's determination, and as we cannot say their verdict on the question of the exercise of ordinary care by intestate was manifestly against the weight of the evidence, it will not be disturbed.

During the course of the trial certain proceedings took place out of the jury's presence in the court's chambers. There counsel for appellant offered in evidence what purported to be a certified order of the Probate Court. The document has not been preserved in the bill of exceptions, nor anything from which its relevancy or materiality can be determined. Hence, regardless of the irregularity of such proceedings, the correctness of the court's rulings in sustaining an objection thereto cannot be ascertained from the record and therefore is not open for review.

Counsel for appellant then, also while in chambers, offered "to show by witness" that "in pursuance of said order" payments of certain amounts were made to appellee as administratrix of the estate of said Cassidy by the several co-defendants who had been dismissed out of the case and that they had been so dismissed. Objection to the offer was sustained. Even had the offer been sufficiently comprehensive to disclose the admissibility of what was thus proposed, yet as no witness necessary to prove the same was called and asked questions designed to bring out the facts embraced in the offer no error was committed. It was said in Chicago City Ry. Co. v. Carroll, 206 Ill., 318, where a similar offer was made in an irregular way, that a witness should have been called to the stand, a question put to him, the court allowed to rule upon it, and then, upon an adverse ruling, an offer should

the other hand, evidence was offered of his habit of notoriety and to the effect that the post mortem examination held two days later disclosed no evidence of alcohol in the system. We need not review the testimony on this subject. The question of fact presented was particularly one for a jury's determination, and we cannot say that it vitiated on the question of the exercise of ordinary care by intestate was manifestly against the weight of the evidence, it will not be disturbed.

During the course of the trial certain proceedings took place out of the jury's presence in the court's chambers. There counsel for appellant offered to evidence what purported to be a certified copy of the Orphans Court. The document has not been preserved in the bill of exceptions, nor anything from which its relevancy or materiality can be determined. Hence, regardless of the irregularity of such proceedings, the succession of the court's rulings in excluding as objection thereto cannot be sustained from the record and therefore is not open for review.

Counsel for appellants then, also while in chambers, offered "to show by witness" that "in numerous of said cases" payments of certain amounts were made to appellee as administrator of the estate of said Cassel by the several co-defendants who had been eliminated out of the case and that they had been so eliminated. Objection to the offer was sustained. Even had the offer been sufficiently comprehensive to include the admissibility of what was thus proposed, yet as the witness necessary to prove the same was called and asked questions designed to bring out the facts embraced in the offer no error was committed. It was said in Commonwealth vs. [illegible], 2 [illegible] 124, 127, that a similar offer was made in an irregular way, that a witness should have been called to the stand, a question put to him, the court allowed to rule upon it, and then, upon an adverse ruling, an offer should

have been made of what was expected to be proved. This is unquestionably the regular and usual practice when the evidence must come from the witness stand. Otherwise its admissibility is not raised upon the record for review.

In this view of the case the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

368 - 26542

MABEL DeBENEDITTO,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY
et al.,
Appellants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

2221.A.672

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action brought by appellee against appellant companies, operating under the name of Chicago Surface Lines, to recover damages for personal injuries resulting from her fall from one of its south bound cars on Wentworth avenue at 57th street, Chicago. This appeal is from a judgment for $2,800 entered on a verdict for that amount in appellee's favor.

The declaration contained three counts. The second was dismissed. The first charges that before the car in question came to a stop the motorman so "negligently opened the front or exit door of said car and in bringing the car to a full stop so carelessly, negligently and improperly operated the same that plaintiff was thrown through and out of said open doorway to and upon the street." The third count merely charges "that while she was in the act of alighting from said street car * * * the motorman, so carelessly, negligently and improperly operated the same that plaintiff was thrown from and off of said street car to and upon the street and pavement."

The theory of plaintiff's case was that she had stepped into the front vestibule of the car for the purpose of alighting therefrom; that before it stopped the motorman opened the exit doors, and a jerk of the car caused her to be thrown through the open doors to the street pavement.

MR. JUSTICE BARRETT DELIVERED THE OPINION OF THE COURT.

This is an action brought by appellee against appellant company, operating under the name of Chicago Surface Lines, to recover damages for personal injuries resulting from her fall from one of its south bound cars on Cottage Grove avenue at 47th street, Chicago. This appeal is from a judgment for $2,500 entered on a verdict for that amount in appellee's favor.

The declaration contained three counts. The second was eliminated. The first charges that before the car in question came to a stop the motorman so "negligently opened the front or exit door of said car and in bringing the car to a full stop so carelessly, negligently and improperly operated the same that plaintiff was thrown through and out of said open doorway to and upon the street." The third count merely charges "that while she was in the act of alighting from said street car * * * the motorman, so carelessly, negligently and improperly operated the same that plaintiff was thrown from and off of said street car to and upon the street and pavement."

The theory of plaintiff's case was that she had alighted from the front vestibule of the car for the purpose of alighting therefrom; that before it stopped the motorman opened the exit door, and a jerk of the car caused her to be thrown through the open door to the street pavement.

The theory of the defense was that said doors were not opened before the car stopped, and if they were it would not constitute actionable negligence, and that there was no jerk of the car and no cause for plaintiff's fall except her state of intoxication.

On these issues of fact we concur with appellants' contention that the verdict is manifestly against the weight of the evidence. Even if the evidence supported the conclusion that the doors of the car were opened before the car stopped, yet under the reasoning of the court in Bunack v. C. C. Ry. Co., 283 Ill., 117, and authorities there cited and relied upon, the opening of the doors just before the car stopped cannot be regarded as actionable negligence.

The claim of actionable negligence in the operation of the car must, therefore, rest upon proof offered to show that the car was so operated as to cause it to jerk and thereby throw plaintiff through said doors. We think the preponderance of the evidence is clearly against that claim which rests upon the evidence of plaintiff alone. No witness corroborates her. She testified that after stepping in the front vestibule she took hold of the iron rail behind the motorman with her left hand; that the door was then open and that "the car gave a lurch or jerk" and she "was out of the door"; and that she became unconscious after striking the pavement. She could not tell whether the car jerked forwards or backwards, but the undisputed testimony is that the car had stopped and that she fell right opposite the door. She testified that she didn't know whether the car was standing or in motion when she fell off; that she didn't remember or realize anything more until she was going up the steps to her home. Her evidence indicated a very indistinct recollection of her surroundings both just

The theory of the defense was that said doors were not opened before the car stopped, and if they were it would not constitute actionable negligence, and that there was no lack of the car and no cause for plaintiff's fall except her state of intoxication.

On these issues of fact we concur with appellants' contention that the verdict is manifestly against the weight of the evidence. Even if the evidence supported the conclusion that the doors of the car were opened before the car stopped, yet under the precedent of the court in Spiegel v. [illegible], [illegible] Ill., 117, and substantial many other and valid cases, the opening of the doors just before the car stopped cannot be regarded as actionable negligence.

The claim of actionable negligence in the operation of the car must, therefore, rest upon proof offered to show that the car was so operated as to cause it to jerk and thereby throw plaintiff through said doors. To which the preponderance of the evidence is strongly against, all which rests upon the evidence of plaintiff alone. No witness corroborates her. She testified that after stepping in the front vestibule she took hold of the iron rail behind the motorman with her left hand; that the door was then open and that "the car gave a lurch or jerk" and she "was out of the door"; and that she became unconscious after striking the pavement. She could not tell whether the car jerked forward or backward, but the undisputed testimony is that the car had stopped and that the full right opposite the door. She testified that she didn't know whether the car was standing or in motion when she fell off; that the driver's treatment of trifle matters was partly at fault; that the driver was not at the steps to her knowledge; that a very insufficient consideration of her correspondence was that

before and after the fall, although it is clear that she never lost consciousness and that her head was not hurt from the fall.

The conductor, the motorman and four passengers (including another conductor) all testified to the effect that there was no jerking or jolting of the car, some positively, and others that they noticed nothing out of the ordinary. If there had been any unusual jerking of the car other than what might be incidental to ordinary operation, especially such as to bring about such a result, it would be strange if none of these witnesses noticed it, three of whom were in the vestibule with her. There is nothing in the record that tends in the slightest to impeach their veracity. On the other hand, there is much evidence tending to show that appellee was under the influence of liquor to an extent that impaired her mental faculties and physical control, and that by reason of the loss of the latter she stumbled and fell out of the door after the car had stopped. She admitted that she had a drink of whiskey at a liquor store just before getting on the car, and she had a bottle of it under her arm when she fell. Her conduct when getting on the car, while in it, and while leaving it was such as to indicate that she was somewhat intoxicated, and in view of the evidence thereon her testimony as to the effect of the drink upon her merits little consideration. Her conduct appears to have been such as to attract the attention of passengers in the car and furnish some merriment. The description of it by one witness supports the theory of intoxication. One passenger testified that she did not have control of her feet and staggered towards and out of the vestibule door. Another passenger, a boy, said he felt something push him off the lower step as he was alighting from the car and turning around saw appellee lying on the ground. His father who had not yet left the car and was standing immediately back of the motorman, testified

that the vestibule door swung back violently, that immediately appellee came through the same, "bumped" him against the iron railing and fell through the open doorway, but that nothing had happened to jerk or jolt him out of his position. The motorman testified that she came through the swinging door very fast "bumped" against said witness and fell headlong into the street. It was about nine o'clock at night. Plaintiff lived at 65th street. There was no apparent reason why on her way home at that hour she should get off at 57th street, a mile or more from her home.

She was immediately helped back into the vestibule of the car by two of the passengers and stood there in the vestibule and talked while the car was going from 57th street to 65th street where, with their support, she got off and walked to her home on that street. For a time she refused to give either her name or residence. Her testimony that she "must have been unconscious" when picked up because she didn't remember anything about it nor anything before she got home confirms the conclusion, in view of the circumstances detailed, that her mind was clouded as the result of intoxication and that she had no clear comprehension or recollection of the real facts. Several of the witnesses testified positively that she was drunk. She is disputed as to every essential detail by numerous witnesses and corroborated by none upon the main fact relied upon, that there was a jerking of the car. There was a clear preponderance of evidence against her contentions and the judgment must be reversed with a finding of fact that there was no negligence as charged in the declaration.

REVERSED WITH FINDING OF FACTS.

Gridley, P. J., and Morrill, J., concur.

that the ventilate door swung back violently, that immediately afterwards the same "Jumper" did against the iron railing and fell through the open doorway, but that nothing had happened to Jack or jack has out of his position. The witness testified that she came through the swinging door very fast "Jumper" (whose wife testified that Jack had left the house. It was about nine o'clock at night. Plaintiff lived at 6308 street. There was no apparent reason why on her way home at that hour she should get off at 70th street, a mile or more from her home.

She was immediately helped back into the vestibule of the car by two of the passengers and stood there in the vestibule not called while the car was going from 70th street to 63rd street where, with their support, she got off and walked to her home on that street. For a time she refused to give either her name or residence. Her testimony that she "must have been unconscious" was rebut by witness who "didn't remember anything about it nor anything before she got home confirms the conclusion, in view of the circumstances detailed, that her mind was clouded as the result of intoxication and that she had no clear conception or recollection of the real facts. Several of the witnesses testified positively that she was drunk. She is disputed in to every essential fact by numerous witnesses and corroborated by more than the mere fact relied upon, that there was a jerking of the car. There was a clear preponderance of evidence against her contentions and the judgment must be reversed with a finding of fact that there was no negligence as charged in the complaint.

Reversed with finding of fact.

Dissenting, P. J., and Gridley, J., opinion.

368 - 26842

FINDING OF FACTS.

We find that the exit door of the car in question was not opened before the car stopped, that the car did not lurch or jerk as alleged in the declaration, that appellee's injuries were not caused by negligence on the part of appellants, and that appellants were not guilty of negligence as charged in the declaration.

387 - 26561

CRANE COMPANY,
Appellant,

vs.

LEROY R. PARKER et al.,
Appellees.

APPEAL FROM
SUPERIOR COURT OF
COOK COUNTY.

222 I.A. 672

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant filed its bill in equity on March 31, 1914, to have a judgment that was rendered against it May 14, 1912, in a personal injury suit, for $1,000 damages in favor of Leroy R. Parker, one of the appellees, set aside on the ground that said judgment was procured by fraud and perjury, and asking that a new trial be granted and that an injunction be issued restraining the collection of said judgment. The issues were referred to a master in chancery whose report was confirmed, and in pursuance thereof a decree was entered dismissing the bill for want of equity.

We do not deem it necessary in reaching the conclusion that the decree should be affirmed to enter into a detailed comparison of the evidence adduced here in this case with that introduced at the trial of the law suit, for a comparison shows that in the main the evidence on which complainant relies is merely cumulative and not conclusive, and for that reason justified the decree. It does not appear from the evidence offered in support of the bill that said Parker had no legal cause of action. It goes rather to the extent of his injuries and the amount of the damages sustained. The cause of action for personal injuries rested upon evidence that complainant's automobile truck bumped into the back end of a street car on which Parker was riding, causing the injuries he complained of.

Appellant Chase has this in supply on March 21, 1924, to have a judgment that was rendered against it May 24, 1923, in a personal injury suit, for $4,000 damages in favor of Harry G. Parker, one of the appellees, and also on the ground that said judgment was procured by fraud and perjury, and asking that a new trial be granted and that an injunction be issued restraining the enforcement of said judgment. The lower court sustained in a motion to dismiss, whose report was confirmed, and in pursuance thereof a decree was entered dismissing the bill for want of jurisdiction.

We do not deem it necessary to recapitulate the evidence that the decree should be affirmed to enter into a detailed comparison of the evidence adduced here in this case with that introduced at the trial of the law suit. For a comparison shows that in the main the evidence on which complainant relies is merely cumulative and not conclusive, and for that reason justified the decree. It does not appear from the evidence offered in support of the bill that said Parker had no legal cause of action. It goes rather to the extent of his injuries and the amount of the damage sustained. The cause of action for personal injuries resting upon evidence that complainant's automobile turned turtle in the back end of a street car on which Parker was riding, causing the injuries he complained of.

Among other claims bearing on the question of the extent of his injuries relied on by Parker in that suit was that he had certain attacks of fits or convulsions after but not before said accident, and that he was obliged to resort to the use of crutches. On the trial of the issues in the instant case there was testimony that he did not have to use such crutches, that in using them at the time of the law suit he was malingering, that he had fits and convulsions prior to such accident, and committed perjury in testifying as to these matters. Complainant claimed that it had not ascertained the facts with respect to these matters until after the trial of the law suit and shortly before the filing of said bill. But whether or not such fits and convulsions were the proximate results of the accident in question, and whether or not there was any necessity for the use of crutches as a result of the accident, were controverted questions at the trial of the law suit upon which much evidence was heard. It appears that complainant, the defendant at that trial, called four expert witnesses who gave it as their opinions that said Parker could not have been seriously enough injured to necessitate the use of crutches before or at the time of the trial, and that he was suffering from hysteria not produced by trauma or else he was malingering a condition which he did not have; and it would seem that the jury in rendering a verdict for only $1,000 did not believe the testimony of Parker and his witnesses as to the extent and seriousness of his injuries. Nor is it apparent that if a new trial were had Parker would not be able to show that he received some injury as a result of complainant's negligence. In other words, the claim of fraud and perjury does not go to the cause of the action but to the amount that might be recovered.

But it is the established rule laid down in this State that "false testimony given at the trial, or false

Among other claims bearing on the question of the amount of his injuries relied on by Hooker in that suit was that he had certain attacks of fits or convulsions after but not before such accident, and that he was obliged to resort to the use of crutches. In the trial of the issues in the instant case there was testimony that he did not have to use such crutches, that in using them at the time of the law suit he was malingering, that he had fits and convulsions prior to such accident, and committed perjury in testifying as to these matters. Complainant claimed that it had not ascertained the facts with respect to these matters until after the trial of the law suit and shortly before the filing of said bill. The whether or not such fits and convulsions were the proximate results of the accident in question, and whether or not there was any necessity for the use of crutches as a result of the accident, were controverted questions at the trial of the law suit upon which much evidence was heard. It appears that complainant, the defendant at that trial, called four expert witnesses who gave it as their opinions that said Fryer could not have been seriously enough injured to necessitate the use of crutches before or at the time of the trial, and that he was malingering from hysteria not produced by trauma or else he was malingering a condition which he did not have; and it would seem that the jury in rendering a verdict for only $1,000 did not believe the testimony of Fryer and his witnesses as to the extent and seriousness of his injuries. Nor is it apparent that if a new trial were had Fryer would not be able to show that he re-ceived some injury as a result of complainant's negligence. In other words, the claim of fraud and perjury does not go to the cause of the action but to the amount that might be recovered.

And it is the established rule laid down in this Circuit that false testimony given at the trial, or false

assertions as to liability are not grounds for setting aside a judgment * * *. Nor is insisting upon an unfounded or overstated claim." (Kretschmar v. Kuprecht, 230 Ill., 492, and cases there cited.) It is also the rule in this State that evidence to impeach witnesses examined upon the original hearing is not sufficient ground for allowing a bill for review, (Johnson v. Building & Loan Association, 133 Ill. App., 213; Williams v. Williams, 72 Ill. App., 200) and it is said in People v. McCullough, 210 Ill. 488-510, that "it is well settled that a new trial will not be granted simply for the purpose of admitting inconclusive, cumulative testimony or impeaching testimony." (Cases cited.)

It is said in the case of Nelson v. Meehan, 155 Fed., 1, 12 L. R. A. (N.S.) 374, where an extensive review of authorities on the subject is made, that the great weight of authority is that the acts for which a court of equity will, on account of fraud, annul a judgment or decree between the same parties after the term is ended, must have relation to frauds extrinsic or collateral to the matter tried, and not to a fraud on which the decree was rendered. The case of United States v. Throckmorton, 98 U. S., 61, was recognized in said opinion as the leading case on the subject and has been adhered to in later decisions of that court. It is urged here that it was overruled by Marshall v. Holmes, 140 U. S., 589. But as indicated in the opinion in the Meehan case, that is not the view taken by the Federal courts.

We need not, therefore, enlarge on the subject by an analysis of the cases wherein the doctrine has been asserted or applied. What is claimed to have been false testimony in the original suit related to the character and extent of the injuries sustained, issues upon which there was a clear-cut controversy and which complainant must or should have been

assertions as to liability are not grounds for setting aside a judgment * * *. Nor is libelous upon an unknown or overslaughed claim." (Gertzenberg v. Dougherty, 209 Ill., 182, 186, and cases there cited.) It is also the rule in this state that evidence is improper without connected upon the original hearing is not sufficient ground for allowing a bill for review. (Johnson v. Building & Loan Association, 190 Ill. 199, 202; Williams v. Williams, 72 Ill. App., 300) and it is said in Bonnie v. Mohlmann, 230 Ill. 488-494, that "it is well settled that a new trial will not be granted simply for the purpose of obtaining cumulative testimony or impeaching testimony." (Cases cited.)

It is said in the case of Kalsow v. Mohlmann, 188 Ind., 1, 18 L. R. A. (N.S.) 27, where an extensive review of authorities on the subject is made, that the great weight of authority is that the rule for which a new of equity will, on payment of fraud, annul a judgment or decree between the same parties after the time is ended, when fraud, violence or fraudulent extrinsic or collateral to the matter tried, and not to a fraud on which the decree was rendered. The case of Mahan Coffee v. Fitzhugh, 84 S. W., 76, on the judgment in said opinion of the lower court on the subject and has been adhered to in later decisions of that court. It is urged here that it was overruled by Hemphill v. Mohlmann, 148 N. W., 388. But as stated in the opinion in the Mohlmann case, that is not the view taken by the federal courts.

We read now, therefore, subject on the subject by an analysis of the cases wherein the doctrine has been asserted or applied. That is claimed to have been false testimony in the original suit relied to the character and extent of the injuries inflicted, there was also claim that a financial embarrassed and which complainant must or should have been

prepared to meet in that case. It appears, therefore, that the proof relied upon to establish the falsity of the testimony in the original suit is merely cumulative or impeaching upon the issues previously presented and disposed of. Therefore, the doctrine stated by our Supreme Court in the Kretschmar case, supra, must control.

We think, therefore, the bill was properly dismissed and the decree will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

411 - 26585

RIVERSIDE OIL COMPANY OF ILLINOIS,
a corporation,
Appellant,

vs.

WILLIAM R. O'TOOLE,
Appellee.

Appeal from
Municipal Court
of Chicago.

222 I.A. 673

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a suit brought upon two promissory notes of same date payable to the order of appellant, signed "Halsted & 58th St. Garage" and "F. H. Ebel."

The statement of claim alleged that defendant O'Toole and Frank H. Ebel were copartners trading under the name of Halsted & 58th Street Garage, and Ebel died and left no estate.

In his affidavit of merits O'Toole stated that on the date of the notes and for a long time prior thereto he was not a copartner of Frank H. Ebel trading under the name of Halsted & 58th Street Garage, and denied any indebtedness on the notes.

O'Toole was examined under sec. 33 of the Municipal Court Act, and testified that he was never in partnership with said Ebel under the name of "Halsted & 58th Street Garage," and nothing else was drawn out in his examination that had any legitimate tendency to refute such testimony. No other evidence was introduced, except two letters from appellee, which had no tendency to show a partnership under said name or defendant's liability upon any note so signed. The court properly held therefore that the evidence was insufficient to prove plaintiff's claim. As the only question presented is as to the correctness of the court's finding, the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

433 - 26507

A. EMMA SMITH,
Appellee,

vs.

CONSUMERS OIL & SHALE COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

221 I.A. 678

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee, whom we shall refer to as plaintiff, sued appellant, hereinafter called defendant, upon a contract whereby it is claimed as the ground of recovery that defendant was at the end of 45 days after giving a certificate of stock to plaintiff for 44,000 shares of its capital stock to repurchase the same on demand at not less than $2200.

The statement of claim sets up in substance that the issuance of said stock was upon an adjustment made between them for dividends on certain other shares of the capital stock of defendant previously issued to plaintiff. Said adjustment was on January 16, 1920. On that date one Wallace Streeter sent a letter on behalf of plaintiff to Ralph R. Langley, president of defendant, acknowledging the receipt of the certificate for said 44,000 shares of stock, and stating his and plaintiff's understanding of the transaction, among other things, defendant's obligation to repurchase said stock as aforesaid; and the letter closed with the request that said Langley advise the writer if such statement agreed with his understanding of the matter. A reply was made January 23rd, saying:

"Dear Mr. Streeter:
I have your letter of January 16th in regard to the A. Emma Smith matter and in reply will say that I think your letter covers the situation as we discussed it.
(Signed) Ralph R. Langley."

Upon this, when we shall refer to as plaintiff, was [illegible]. Depositor [illegible], who a member [illegible] it is claimed on the ground of recovery that defendants was at the end of 48 days after giving a certificate of stock to plaintiff for 44,000 shares of the capital stock in repurchase the same on demand at not less than $2000.

The statement of claim sets up in substance that the issuance of said stock was upon an adjustment made between them for dividends on certain other shares of the capital stock of defendant previously issued to plaintiff. Said adjustment was on January 16, 1890. On that date one William Atterbury wrote a letter on behalf of plaintiff to Ralph R. Langley, president of defendant, acknowledging the receipt of the certificate for 44,000 shares of stock, and stating the and plaintiff's understanding of the transaction, among other things, defendant's obligation to repurchase said stock on request; and the letter closed with the request that with language advise the writer if such statement agreed with his understanding of the matter. A reply was made January 22nd, reads:

"Dear Mr. Atterbury:

I have your letter of January 16th in regard to the R. Lange Smith matter and in reply will say that I think your letter covers the situation as we discussed it.

(Signed) Ralph R. Langley."

The statement of claim sets up the tender of said stock, demand for payment of the $2,200, and defendant's refusal to pay it.

Defendant filed its appearance, demanded a trial by jury, and filed its affidavit of merits which, on motion of plaintiff, was stricken from the files. The court thereupon entered an order of default against defendant for want of an affidavit of merits, and assessed plaintiff's damages without calling a jury, in the sum of $2,221, which included interest on the $2,200. The various proceedings were over defendant's objection, and its motion in arrest of judgment was overruled.

It is contended that defendant's affidavit of merits presented a good defense to the whole of plaintiff's claim. If so, we need not consider the other points raised in the argument for a reversal and remanding of the cause would be necessary.

In substance said affidavit of defense made by the president of defendant admitted that plaintiff was the holder of record of shares of the capital stock of defendant on January 16, 1920, but denied that any dividends thereon had been declared prior to said date, as alleged by plaintiff, but admitted an adjustment of defendant's claim of a right to dividends and that it issued in pursuance thereof the stock certificate in question.

Defendant, however, denied that there was any agreement in writing and that the letters referred to in the statement of claim constitute an agreement with regard thereto. It specifically denied any agreement to repurchase said stock for $2,200 and alleged that in said adjustment whereby she received such certificate of stock there was an accord and satisfaction of all claims against defendant.

Certain rules of the Municipal Court of Chicago are

The agreement of claim sets up the bonded of said stock, demand for payment of the $8,000, and defendant's refusal to pay it.

Defendant filed its appearance, demanded a trial by jury, and filed its affidavit of merits which, on motion of plaintiff, was stricken from the files. The court thereupon entered an order of default against defendant for want of an affidavit of merits, and entered plaintiff's demand claim, calling a jury, in the sum of $8,521, which included interest on the $8,000. The various proceedings were over defendant's objection, and its motion in arrest of judgment was overruled.

It is contended that defendant's affidavit of merits overcomes a good defense to the claim of plaintiff's claim. If so, we need not consider the other points raised in the argument for a reversal and remanding of the cause would be unnecessary.

In substance said affidavit of defense made by the president of defendant asserted that similarly as the bonds of record of shares of the capital stock of defendant on January 16, 1900, but denied that any dividends thereon had been declared prior to said date, as alleged by plaintiff, but admitted an adjustment of defendant's claim of a right to dividends and that it issues in purchase thereof the stock certificate in question.

Defendant, however, denied that there was any agreement in writing and that the letters referred to in the statement of claim constitute an agreement with regard thereto. It specifically denied any agreement to repurchase said stock for $8,000 and alleged that in said adjustment no party who received such certificate of stock claims was an account and satisfaction of all claims against defendant.

Certain rules of the Municipal Court of Chicago are

made a part of the record. Rule 18 provides, among other things, that the defendant's affidavit of merits "shall specify the nature of such defense, whether by way of denial, or by way of confession and avoidance, in such manner as to reasonably inform the plaintiff of the defense that will be interposed at the trial. * * "

Rule 15 provides, among other things, that "(B) Every pleading shall contain a concise statement of the ultimate facts on which the party pleading relies for his claim of defense, as the case may be, but not the evidence by which they are to be proved."

"(E) The denial of any material allegation shall constitute an issue; no other joinder of issue is necessary."

The gist of plaintiff's claim on which the action is predicated is that there was an agreement on the part of defendant to repurchase said certificate of stock for $2,200 at the end of 45 days after it was issued. That agreement was specifically denied. It is also urged by plaintiff, and denied by defendant, that such agreement was in writing. Plaintiff sets forth the two letters referred to as constituting the agreement in writing. These letters are not specifically denied, but it is plain that they do not constitute an agreement between plaintiff and defendant company but merely a declaration on one side of its understanding of an executory oral agreement, and at most an admission by the other side that such understanding was correct. When, however, the latter's letter is critically examined it is doubtful whether it goes any further than an admission that the matters referred to in plaintiff's letter, or that written in her behalf, were simply discussed. It does not directly admit that they were agreed to, and defendant's affidavit of merits expressly denies an agreement.

We think there was a clear-cut issue as to what was

made a part of the record. Rule 16 provides, among other things, that the defendant's affidavit of merits "shall specify the nature of such defense, whether by way of denial, or by way of confession and avoidance, in such manner as to reasonably inform the plaintiff of the defense that will be interposed at the trial. x x x"

Rule 16 provides, among other things, that "(1) Every pleading shall contain a concise statement of the ultimate facts on which the party pleading relies for his claim or defense, as the case may be, but not the evidence by which they are to be proved."

"(2) The denial of any material allegation shall constitute an issue; no other pleading of issue is necessary."

The gist of plaintiff's claim on which the action is predicated is that there was an agreement on the part of defendant to reimburse said certificate of stock for $2,500 at the end of 45 days after it was issued. That agreement was specifically denied. It is also urged by plaintiff, and denied by defendant, that such agreement was in writing. Plaintiff sets forth the two letters referred to as constituting the agreement in writing. These letters are not specifically denied, but it is claim that they do not constitute an agreement between plaintiff and defendant company but merely a declaration on one side of its understanding of an previous oral agreement, and of such an admission by the other side that such understanding was correct. Then, however, the latter's letter is critically examined it is doubtful whether it goes any further than an admission that the matters referred to in plaintiff's letter, or that written on her behalf, were simply discussed. It does not directly assert that they were agreed to, and defendant's affidavit of merits expressly denies an agreement.

In fact there was a clear-cut issue as to what was

the contract between the parties, which was apparently an oral one, and the letters aforesaid were merely intended to obtain an admission from defendant as to what were the terms of said oral agreement. The letters fall far short of a written contract mutually binding on the parties hereto. We think, therefore, it was error to strike the affidavit of defense, and the judgment should therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Morrill, J., concur.

the conflict between the parties, which was apparently an open one, and the letters alternate were merely intended to obtain an admission from defendant as to when were the terms of said oral agreement. We believe full fair credit of a written contract usually yielding on the positive proof. We think, therefore, it was error in giving the activity of defendant, and the judgment should therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

Shirley, P. J. and Sherwin, J., concur.

465 - 28639

JOSEPH EZIM,
Appellee,

vs.

C. B. SHAFFNER,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Judgment on a statement of claim and cognovit was entered in the court below in favor of appellee for $707.43, the aggregate of three separate promissory notes of the same date, pursuant to a warrant in each of said notes authorizing such confession. Copies of the notes are attached to and made a part of the statement of claim.

Twelve days later an order was entered denying a motion to vacate and set aside said judgment, from which this appeal was taken. There being no bill of exceptions preserving such motion we cannot know the grounds on which it was based and, therefore, whether the points raised here were first raised in the court below, as they should have been to entitle appellant to a review of them.

The points raised, however, are untenable. They are, first, that the Municipal Court not being a court of general jurisdiction had no power to consolidate the different actions arising on the several notes, and the case of Iglehart v. Chicago Marine etc. Ins. Co., 28 Ill., 514, to the effect that a court of general jurisdiction has such power is cited in support of the contention. We do not think it is a legitimate inference that because the Municipal Court is not a court of general jurisdiction it has no such power. That court is given unlimited jurisdiction in contract cases and

in cases of the first class, of which this is one, it may conform to the practice of the Circuit Court. The notes and the warrants to confess being made by the same party and held by plaintiff, we see no reason why on general principles the several notes cannot be declared upon in one action in the Municipal Court as well as in a court of general jurisdiction.

Another point made is that there was not valid proof of the execution of said notes. The same authority is referred to. But as said in the opinion of that case, the judgment was confessed in open court, and the presumptions were in favor of the regularity of all the proceedings. Especially is that so in the absence of a bill of exceptions. But the record shows an affidavit of the execution of said notes, and the only question raised with regard thereto is that it was made by an attorney for plaintiff. The attorneys for plaintiff appear to be the firm of Levisohn & Levisohn. The affidavit is made by Arthur A. Levisohn. It does not appear that he is a member of said firm and, if he were, we do not think it would have been reversible error for the court to accept such proof. Accordingly the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Morrill, J., concur.

in order of the first class, of which this is one, it may mention to the benefit of the friendly Court. The defendant and the accounts in question being made by the same party and kept by plaintiff, -- we see no reason why we should prejudice the powerful motor cannot be litigated upon in one action in the Municipal Court as well as in a court of general jurisdiction.

Another point made is that there was not enough proof of the execution of such notes. The same sufficiently is referred to. But as said in the opinion of that court, the judgment was conferred in open court, and the presumptions were in favor of the regularity of all the proceedings. Especially is that so in the absence of a bill of exceptions. But the record shows an affidavit of the execution of said notes, and the only question raised with regard thereto is that it was made by an attorney for plaintiff. The attorney for plaintiff appears to be the firm of Davidson & Davidson. The affidavit is made by Arthur L. Davidson. It does not appear that he is a member of said firm and, if he were, we do not think it would have been reversible error for the court to accept such proof. Accordingly the judgment will be affirmed.

AFFIRMED.

Brickley, J. dissenting (Ritter, J., concur).

462 - 26636

SALOMON WATERTON & COMPANY, a corporation, Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT, COOK COUNTY.
MARY SMITH, Appellant.	)	

222 I.A. 673

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Judgment by confession was entered in the Circuit Court of Cook County on July 14, 1917, for $1879.80 and costs, in favor of appellee and against appellant, and execution issued thereon. June 19, 1920, the defendant, who is appellant here, entered a motion to vacate the judgment and for leave to plead. This motion was denied on July 31, 1920. Thereupon this appeal was prayed and allowed.

The judgment is based upon twelve notes of $150 each, dated May 5, 1917, payable monthly, which were given by defendant to plaintiff in part payment for materials and labor furnished by it in making certain alterations in and repairs upon the premises at 536 North Clark street, Chicago. Plaintiff undertook the performance of this work pursuant to a contract with defendant in October, 1916, for the sum of $4800 to be paid to it by defendant. As the work progressed defendant paid plaintiff $2,000 on account and also executed and delivered to it the notes above mentioned amounting to $1800. The remaining $1000 of the contract price was unpaid.

July 25, 1917, plaintiff filed in the Circuit Court a bill to foreclose a mechanic's lien claimed by it upon the premises in question for the material and labor furnished as aforesaid. This bill was still pending and about to be decided

No. 22 - March

MODERN LAUNDRY & CONCRETE,
a corporation,

respondent,

vs.

ANNEXE BECK
CIRCUIT COURT,
Cook County.

MARY SMITH,

Appellant.

22 I.A. 673

Mr. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Judgment by confession was entered in the Circuit Court of Cook County on July 14, 1917, for $1277.00 and costs, in favor of appellee and against appellant, and execution issued thereon. June 17, 1920, the defendant, the appellant here, entered a motion to vacate the judgment and for leave to plead. This motion was denied on July 22, 1920. Thereupon this appeal was prayed and allowed.

The judgment is based upon twelve notes of $120 each, dated May 5, 1917, payable monthly, which were given by defendant to plaintiff in part payment for materials and labor furnished by it in making certain alterations in and repairs upon the premises of the Park Crest Hotel, Chicago. Plaintiff maintains the performance of this work pursuant to a contract with defendant in October, 1916, for the sum of $1800 to be paid to it by defendant. As the work progressed defendant paid plaintiff $4,500 on account and also executed and delivered to it the notes above mentioned amounting to $1800. The remaining $1000 of the contract price was unpaid.

July 24, 1917, plaintiff filed in the Circuit Court a bill to foreclose a mechanic's lien claimed by it upon the premises in question for the material and labor furnished as aforesaid. This bill was still pending and about to be dropped

at the time the motion to vacate the judgment herein was made. Upon the hearing of the mechanic's lien case before the master to whom it had been referred, the notes in question were offered and received in evidence and exhibited to defendant's attorney and examined by him. This was on April 25, 1918. These notes bore upon their face the following words: "Judgment entered July 14, 1917. August W. Miller, Clerk of the Circuit Court." Defendant seeks to explain her delay in moving to vacate the judgment by alleging in her affidavit in support of the motion that she had no knowledge of the entry of the judgment until about June 11, 1920, but does not state from what source she acquired her information on that date. Her attorney, who also represented her in the mechanic's lien proceeding and was present at the hearing of April 25, 1918, makes affidavit that the first knowledge which he had of the entry of the judgment was on or about June 16th or 17th, 1920, so that apparently these affiants derived no knowledge of the entry of the judgment from the proceedings before the master in April, 1918.

A reversal of the order of the Circuit Court denying a motion to vacate the judgment is sought upon the ground that defendant's affidavits show a good defense to an action upon the notes and upon the further ground that the Circuit Court erred in permitting certain counter affidavits to be presented upon the hearing of the motion to vacate, which tended to show lack of diligence on the part of appellant in making said motion.

While it is true that counter affidavits upon the merits are not admissible upon the hearing of a motion of this kind, there is ample authority for considering such counter affidavits upon the question of diligence. Gilchrist Transportation

at the time the motion to vacate the judgment herein was made.

Upon the hearing of the defendant's like case before the master to whom it had been referred, the notes in question were offered and received in evidence and admitted by defendant's attorney and examined by him. This was on April 28, 1910. These notes bore upon their face the following words: "Judgment entered July 14, 1907. August W. Miller, Clerk of the Circuit Court."

Defendant seeks to explain her delay in moving to vacate the judgment by alleging in her affidavit in support of the motion that she had no knowledge of the entry of the judgment until about June 11, 1909. Yet she has not made clear why she waited so long after receiving her information on that date. Her attorney, who also represented her in the Kendall's case previously, had passed at the hearing of April 28, 1910, notes affidavits that the first knowledge which he had of the entry of the judgment was on or about June 10th or 17th, 1909, so that apparently these affiants derived no knowledge of the entry of the judgment from the proceedings before the master in April, 1910.

A reversal of the order of the Circuit Court denying a motion to vacate the judgment is sought upon the ground that defendant's affidavits show a good defense to the action upon its merits and that the Circuit Court had the "legal power and in permitting certain counter affidavits to be presented upon the hearing of the motion to vacate, which tended to show bad faith or negligence on the part of applicant in making said motion.

While it is true that counter affidavits upon the merits are not admissible upon the hearing of a motion of this kind, there is ample authority for considering such counter affidavits upon the question of diligence. Ill.-Mich. Improvement

Co. v. Northern Grain Co., 204 Ill., 510; Kloepher v. Osborne, 177 Ill. App., 384. Consequently no error was committed by the trial court in that respect.

It will be noted that nearly three years elapsed between the entry of the judgment and the presentation of the motion to vacate and two years intervenes between the time when the notes were brought to the attention of defendant's attorney in the mechanic's lien proceeding and the making of said motion. We are of the opinion that a delay of that length of time is such laches that the trial court was justified in denying the motion to vacate the judgment. Freeman v. Counsell, 203 Ill. App., 333; Thurn v. Schwartz, 197 Ill., 359. The motion being addressed to the discretion of the trial judge, his action in denying the same will not be reversed unless it appears that there has been an abuse of such discretion. Hartford Life Ins. Co. v. Rossiter, 195 Ill., 278; Furman v. Wieczorkowski, 202 Ill. App., 247. The lack of diligence on the part of appellant being so apparent there could be no abuse of discretion on the part of the trial court in refusing to vacate the judgment.

The order of the Circuit Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

Co. v. Northern Grain Co., 204 Ill., 316; Thompson v. Lehmann, 177 Ill. App., 324. Consequently no error was committed by the trial court in that respect.

It will be noted that nearly three years elapsed between the entry of the judgment and the presentation of the motion to vacate and two years intervened between the time when the notice were brought to the attention of defendant's attorney in the mechanic's lien proceeding and the making of said motion. We are of the opinion that a delay of that length of time is much longer that the trial court was justified in denying the motion to vacate the judgment. Freeman v. Gunnell, 204 Ill. App., 490; Thomas v. Doherty, 197 Ill., 384. The motion being addressed to the discretion of the trial judge, his action in denying the same will not be reversed unless it appears that there has been an abuse of such discretion. Hartford Life Ins. Co. v. Bossmeyer, 195 Ill., 208; Freeman v. The Southwestern, 204 Ill., 490, 497. The lack of diligence on the part of appellant being so apparent there could be no abuse of discretion on the part of the trial court in refusing to vacate the judgment.

The order of the Branch Court is affirmed.

AFFIRMED.

DUNCAN, P. J., and DUFFY, J., concur.

468 - 36642.

SAMUEL STERNBERG, Appellant, vs. THE McLEAN TIRE AND RUBBER COMPANY, a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

222 I.A. 674

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is a suit for the recovery of commissions upon the sale of automobile tires alleged to be due under an oral agreement. A trial was had before the court without a jury. The finding and judgment of the Municipal Court were in favor of the defendant. A reversal of that judgment is now sought upon the ground that the preponderance of evidence is in favor of plaintiff. It is also urged by appellant that the trial court erred in excluding certain testimony which was offered on behalf of the plaintiff.

The statement of claim alleges that during October or November, 1918, defendant agreed with Alex and Max Sternberg that they should procure customers for its merchandise, for which contemplated service defendant would pay a commission of 5% on gross sales and that the said Sternbergs procured as a customer the Guarantee Auto Supply Company, which purchased from defendant merchandise to the amount of $60,000, upon which purchase a commission of 5% became due to the said Sternbergs, who assigned their claim to the plaintiff on October 17, 1919.

The affidavit of merits denies the existence of the agreement in question and denies that the said Sternbergs procured the Guarantee Auto Supply Company as a customer for it and denies that as a result of the efforts of the Sternbergs the

222 I.A. 674

said Supply Company purchased $60,000 of merchandise from it, but alleges that in the month of December, 1918, one W. B. Davis, an officer of the defendant company, in conversation with the Sternbergs, stated that it had a certain lot of discontinued tires which it would be glad to sell upon certain terms and offered to pay the said Sternbergs a commission of 5% on any sale of the job lot tires which said Sternbergs might make; that said Sternbergs did not sell and were not instrumental in selling the same. The affidavit further denies that the Sternbergs were employed by or entered into any agreement with defendant to sell or find purchasers for any merchandise for defendant other than said job lot. It admits that during 1919 defendant sold merchandise to said Supply Company but denies that the amount of the sale was $60,000 and denies that it sold any of such job lot to said Supply Company and the existence of any indebtedness on its part to plaintiff.

A large amount of testimony was heard by the trial court on behalf of both of the parties from which it appears that the controversy in question is based upon a certain conversation which occurred at Chicago, Illinois, during the month of December, 1918. At that time one Warren B. Davis, the general manager of defendant, was in Chicago in attendance upon the convention of the National Automobile Accessory Jobbers' Association, representing at that time the M. & M. Company, an automobile jobbing house of Cleveland, Ohio, of which Mr. Davis was vice-president. Other persons were present at the conversation and testified regarding the utterances of the parties. The Sternbergs at that time were employed in selling spark plugs for another company in which one of the witnesses was also interested. This witness testified that the Sternbergs had a contract to represent that company exclusively, although it was their duty to sell for other companies in which the witness was interested when they had the chance. The evidence on behalf

229T.A. 674

said supply company purchased 250,000 of merchandise from it, but alleges that in the month of January, 1938, one T. S. Davis, an officer of the defendant company, in conversation with the interrogator, stated that it had a certain lot of flavored tires which it would be glad to sell upon certain terms and offered to pay the said interrogator a commission of $1.00 for each of the tire that they could sell. Interrogator says that said Davis stated the tire was very hot (interpreted to mean the same. The affidavit further denies that the interrogator was employed by or acting for any independent tire jobber or sell or find purchasers for any merchandise for defendant other than said job lot. It admits that during 1938 defendant took merchandise to sell "upon commission" but claims that the amount of the sale was $47,000 and denies that it sold any of that lot to said Supply Company and the existence of any interest on the part of plaintiff.

A large number of testimony was heard in the trial which lasted for about at least of the greater time which it appears. That the controversy in question is based upon a certain conversation which occurred in Chicago, Illinois, during the month of January, 1938, at that time one Jerome S. Davis, the general manager of defendant was in Chicago in attendance upon the convention of the Tubular Structure Insurance Agents' Association, representing at that time the B. & S. Company, an automobile jobbing house of Cleveland, Ohio, of which Mr. Davis was vice-president. This jobber was present at the conversation and testified regarding the utterances of the parties. The interrogator at that time was engaged in selling equal plugs for another company in which one of the witnesses was also interested. This witness testified that the interrogator had a contract to represent that company exclusively, although it was their job to sell for other companies as also the witness was interested very much and the interrogator. The witness on behalf

of plaintiff consisted chiefly of the testimony of the two Sternberge. The briefs of counsel are devoted largely to a discussion of the conflicting testimony of these witnesses. Each lays stress upon certain features of the testimony which are believed to be in his favor. The weight and significance of different parts of the testimony as viewed from the standpoint of the respective parties are dwelt upon at great length. We do not deem it necessary for us to review this testimony in detail or to discuss at length the views of the respective counsel as to its weight and sufficiency. There was sufficient evidence to sustain the findings of the trial court and these findings will not be disturbed unless against the manifest weight of the evidence in a case where the testimony is conflicting to such an extent as has been indicated. Gilvie v. Copeland, 148 Ill. 104; Bowser v. Musical Courier Co., 211 Ill. App. 372; Caldwell v. Chicago City Rys. Co., 211 Ill. App. 310.

It seems unnecessary for us to discuss the alleged errors of the trial court in ruling on evidence, it being apparent that even if the excluded evidence had been admitted there would have been sufficient evidence in the record to support the findings of the trial court so that the rulings of the court of which complaint is made become immaterial. Goddard v. Anzler, 123 Ill. App. 108.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.